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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Can the ICC properly sanction as just and reasonable a tariff rule which permits one carrier to collect charges for services performed by another?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners State of South Carolina, South Carolina Public Railways Commission, and The American Short Line Railroad Association respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding on June 30, 1982.[1]

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[1] Respondents, in addition to the Interstate Commerce Commission, are the United States, The Seaboard Coast Line Railroad Company and the Southern Railway Company.

OPINIONS BELOW

The decisions of the Administrative Law Judge and the Review Board which were reversed by the Interstate Commerce Commission, both of which are unpublished, are attached as Appendices A and B, respectively. The decision of the Interstate Commerce Commission, which is reported at 365 I.C.C. 274, is attached as Appendix C. The opinion of the U.S. Court of Appeals, which is unpublished, is attached as Appendix D. The notice of judgment of the U.S. Court of Appeals, which is unpublished, is attached as Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 30, 1982 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Revised Interstate Commerce Act are attached as Appendix F to this petition.

STATEMENT OF THE CASE

A. The Nature of the Controversy

South Carolina Public Railways Commission ("SCPRC"), an agency of the State of South Carolina, owns and operates terminal railroads that provide essential transportation services in furtherance of the flow of commerce in and through the State. Among the railroads operated by SCPRC is the Port Terminal Railroad of

South Carolina ("PTSC"), a small Class III common carrier which serves various industries at the port of North Charleston, SC including a grain elevator operated by the South Carolina Farm Bureau Cooperative Association ("Farm Bureau"). Rail cars of grain are transported to North Charleston by Seaboard Coast Line Railroad Company ("SCL") and Southern Railway Company ("SRC"), the Class I line-haul rail carriers who serve the port by interchange with the PTSC. The lines of those two carriers do not reach the Farm Bureau elevator. Therefore, they interchange the cars with PTSC whose lines do reach the elevator, and PTSC delivers the cars to the elevator for unloading.

Frequently, the elevator is unable to accept all of the cars as they are delivered to it for unloading. When that occurs, the cars are held on the lines of PTSC until the elevator can accept them. In order to provide such holding service PTSC must have available sufficient trackage and maintain it in accordance with applicable Federal safety standards. PTSC also provides security for the cars and their contents, maintains records necessary to accurately determine the demurrage charges which accrue while the cars are being held for unloading by the elevator, and provides all of the extra switching that is necessitated by the congestion resulting from the holding of the cars.

PTSC has traditionally covered the costs of performing these services with the demurrage charges collected from the Farm Bureau. However, in 1977 SCL and SRC caused to have published a tariff revision providing that demurrage charges accruing on cars being held by PTSC on its lines would thereafter accrue to SCL and SRC notwithstanding the fact that the services which generate those charges would of necessity continue to be performed by PTSC. Neither SCL nor SRC undertook to provide any

new or additional service to justify the tariff revision. All physical operations remained as they had been and PTSC continued to hold the incoming cars on its lines, to provide all services and to perform all functions in connection with the holding of such cars and to bear the entire cost of providing such services and performing such functions. In effect, the tariff revision created a situation whereby one carrier collects charges for services provided by another and the carrier actually providing the services is denied charges attributable to those services and collects nothing.

B. The Proceedings Below

PTSC asked to have the tariff revision suspended pursuant to 49 U.S.C. § 10707 but the ICC exercised its discretion not to suspend and the revision became effective on August 6, 1977.

After unsuccessfully attempting to resolve the matter through negotiations with SCL and SRC, SCPRC, on May 4, 1978, filed a petition for declaratory order with the ICC pursuant to 5 U.S.C. § 554(e). In that petition, which was docketed as No. 36927, *South Carolina Public Railways Commission Petition For Declaratory Order-Assessment and Collection Of Demurrage Charges,* SCPRC requested the ICC to institute a proceeding for the reception of evidence and issuance of a decision determining the applicability and lawfulness of the tariff provision. On May 14, 1979, after an entire year of deliberation, the ICC by a divided decision of its Division 1, declined to exercise its discretion to institute a declaratory order proceeding. An appeal was promptly filed and, on November 28, 1979, the ICC, again by a divided vote of Division 1, denied the appeal.

In its decision refusing to institute a declaratory proceeding the ICC advised SCPRC that its proper remedy was to file a formal complaint. On December 18, 1979, SCPRC filed such a complaint. The parties filed evidence and legal arguments pursuant to a schedule established by the ICC and on June 24, 1980, an Administrative Law Judge issued an Initial Decision finding Item 380(F) to be unjust and unreasonable and ordering that it be cancelled. SCL and SRC jointly filed an Administrative Appeal to the Initial Decision, to which SCPRC replied and on January 6, 1981 the ICC served a Decision of Review Board No. 4 unanimously affirming the Initial Decision and directing that the offensive tariff provision be cancelled. On January 26, 1981, SCL and SRC filed a pleading styled as a Petition for Administrative Review and Stay of Decision to which SCPRC responded. By order served February 4, 1981, the Commission denied the request for stay of its decision but did not act on the request for administrative review.

Thereafter, SCL and SRC filed a petition with the U.S. Court of Appeals for the Fourth Circuit seeking judicial review of the unanimous Review Board Decision of January 4, 1981. That petition was docketed by the Court fo Appeals as No. 81-1146, *Seaboard Coast Line Railroad Company, et al v. Interstate Commerce Commission, et al.* The Court granted an *ex parte* motion by SCL and SRC for a temporary stay of the Commission's Order but the stay was later vacated and the motion of SCL and SRC for an interlocutory injunction *pendente lite* was denied following briefing and argument. The Court established an expedited briefing schedule pursuant to which an opening brief was filed by SCL and SRC to which South Carolina and SCPRC, intervenors in No. 81-1146, responded.

On May 14, 1981, in the midst of the briefing schedule, the ICC advised the Court that on May 11, 1981 it had decided that the disputed tariff provision involved a matter of general transportation importance and had reopened the case for further proceedings. Based on those developments the ICC requested an order holding proceedings before the Court in abeyance pending further ICC action. The Court granted that motion and on September 8, 1981 the ICC issued the decision which is attached hereto as Appendix C.

On September 22, 1981 South Carolina and SCPRC filed a petition with the U.S. Court of Appeals for the Fourth Circuit seeking judicial review of the ICC decision. After briefing and argument the Court of Appeals issued the decision which is attached hereto as Appendix D.

REASONS FOR GRANTING THE WRIT

The decision of the ICC which was affirmed by the Court below represents a radical departure from long-established precedent and, if permitted to stand, will serve as an invitation for large and powerful carriers throughout the nation to demand payment for services performed by short line and terminal carriers. Such practices will spread rapidly throughout the country and undermine the viability of short line and terminal carriers who will be without regulatory protection to safeguard their right to the charges which accrue for the services that they perform.

Until the decision which is here in issue, the ICC had consistently held that demurrage charges are properly collectable by the carrier on whose lines the charges accrue, i.e., the carrier on whose lines cars are held for loading or unloading in excess of free time at the request of the ship-

per or consignee. Indeed, even in the instant decision the ICC acknowledged that well-established rule as follows:

> We have frequently stated that demurrage is both assessed and retained by the carrier on whose line the detention occurs. See, e.g., *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). When detention occurs at the end of a multi-carrier movement the delivering carrier traditionally collects and retains all demurrage payments. *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *Baltimore & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3rd Cir. 1978). *cert. denied,* 440 U.S. 968 (1978). These general principles reflect the underlying rationale that the carrier who incurs the costs associated with the detention of cars should be compensated by demurrage. See, *Union Belt of Detroit Pooling of Revenue,* 201 I.C.C. 577, 580 (1934).

South Carolina Railways Commission v. Seaboard Coast Line Railroad, 365 I.C.C. 274, 277 (1981).

The policy embodied in the cases cited by the ICC is firmly grounded in both specific statutory mandate and conventional common sense. Congress has expressly commanded the ICC to establish and maintain rules relating to the collection of demurrage which encourage an adequate supply of freight cars and their efficient utilization and distribution. 49 U.S.C. § 10750. In announcing the new rule the line-haul carriers represented that its purpose was to improve car utilization. However, in the proceedings before the ICC, it was shown that after the tariff revision embodying the new rule became effective the line haul carriers eventually were forced to liberalize demurrage regulations applicable to cars held by PTSC because they were

unable to comply with the provisions of their own tariff as they were incapable of effectively administering those provisions without first hand knowledge of the actual date and time of placement and release of cars. This liberalization of the applicable rules had the effect of wholesale relaxation of the incentive for prompt release of the cars. This, of course, is precisely the opposite of the purported justification asserted by the line-haul carriers for the new rule and precisely the opposite of the result intended by Congress in enacting the provisions of 49 U.S.C. § 10750. The ICC inexplicably chose to ignore this pivotal consideration in its reversal of the prior decisions of the Administrative Law Judge and the Review Board.

The deterioration in car utilization, as a result of the new rule sanctioned by the ICC, is not surprising in that the rule places responsibility for enforcement of demurrage regulations in the hands of carriers who, because they are removed from the site at which cars are held for unloading, have no knowledge as to precisely when the cars are tendered to the ultimate consignee for unloading or when the consignee releases the empty cars. At the same time the new rule denies the terminal carrier both the wherewithall and the incentive to administer the demurrage rules. Thus, the Commission has created a situation in which the carrier that has the financial incentive to assess demurrage charges is without the capability of properly calculating them and the carrier that has the capability to properly calculate them has been denied the resources with which to do so.

The problems inherent in such an irrational arrangement are so obvious that even the ICC, prior to the instant case, had recognized the fundamental soundness of having charges for transportation services payable to the carrier that actually provides the services. See, for example, *Kan-*

sas City Power & Light Co. v. Kansas City Southern, 361 I.C.C. 848, 851 (1979), in which the ICC flatly stated that one railroad may not properly charge a shipper for a service performed by another railroad.

In the present decision, which has been sustained by the Court of Appeals with perfunctory deference to agency expertise, the ICC has departed without any adequate justification from its previous policy of long standing and the decisions of the Administrative Law Judge and Review Board which were rendered in consonance with that policy. As was explained by this Court in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 807-08 (1973):

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.

Here there simply is no adequate explanation for the Commission's abdication of its long-recognized responsibility to require demurrage practices which encourage efficient car utilization.

The ICC apparently recognized the unassailable logic of the decisions of its Administrative Law Judge and Review Board which rejected as fundamentally inequitable and unworkable a tariff rule providing that one carrier should collect for work performed by another. Because it could not justify such a situation, the ICC avoided dealing with it by conjuring a novel theory of agency which had never been asserted or even suggested by any of the parties.

Essentially, the ICC determined that PTSC does not act as a carrier in its own right but merely as an agent for the line-haul carriers and that the line-haul carriers are the "delivering" carriers for the purpose of determining who is entitled to collect demurrage. This analysis, to which the parties never had an opportunity to respond since it first surfaced in the ICC's final decision, is simply not consistent with the realities of the situation. It ignores, for example, that PTSC is an independent common carrier which provides service pursuant to its own certificate of public convenience and necessity rather than under the aegis of some other carrier. It ignores the fact that PTSC is a party in its own right to tariffs applicable to the involved traffic. It ignores the fact that shippers served by PTSC are directly liable to PTSC for unabsorbed switching charges as to which the purported "principals" have no right or interest. It ignores the fact that only PTSC can physically serve the industries located on its lines and does so as an independent carrier with full rights and obligations as such.

The case principally relied upon by the ICC as the basis for its agency theory not only fails to support the ICC's reasoning but actually demonstrates its invalidity. That case, *Missouri Pacific Railroad Co. v. Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925), relates exclusively to liability for cargo loss or damage pursuant to specific statutory provisions dealing with that subject. It has absolutely nothing to do with the relationship between connecting carriers with regard to their rights to collect and retain charges for services performed on their respective lines which has traditionally been recognized as a connecting carrier relationship rather than a principal-agent relationship.[2] The fact that there is no correlation between

[2]The Commission has frequently held that the relationship that exists between terminal and line-haul carriers with which they interchange traffic is a connecting carrier relationship insofar as the shipp-

a line-haul carrier's status as a "delivering" carrier in terms of liability and its status as a "delivering" carrier in terms of physical operations is underscored by the fact that its "delivering" carrier status for liability purposes is the product of an express statutory provision. Specifically, 49 U.S.C. § 11707(a)(1) provides in pertinent part that:

> A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

The fact that Congress felt compelled to enact this language demonstrates that, in its absence, there would be no basis for concluding that the "delivering" carrier (even for liability purposes) is other than the carrier actually effecting physical delivery of the lading. There is, of course, no equivalent provision establishing the legal fiction of the inbound line-haul carrier as the "delivering" carrier for any purpose other than shipper liability.[3] The fact that the provisions of 49 U.S.C. § 11707(a)(1) (original version at 49 U.S.C. § 20(11) (1951)), have no bearing on the right of a terminal carrier to assess and collect charges for service on its own lines has been recognized by the ICC.

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ing public is concerned, i.e., "so far as the public is concerned, the effect of a switching absorption is to establish a joint rate." *Switching Absorptions*, 47 I.C.C. 583 (1917); *Switching Grain in St. Louis Dist.*, 232 I.C.C. 459, 461 (1939); *Reciprocal Switching Richmond Va.*, 306 I.C.C. 97, 103 (1959).

[3]Aids to statutory construction such as the maxim *Expressio unis est exclusio alterius* compel a conclusion that where, as here, the treatment afforded to intercarrier relationships for purposes of liability to shippers contrast sharply with an absence of similar action with respect to other aspects of intercarrier relationships, the lack of such action was deliberate and intentional. See 73 Am Jur 2d *Statutes* §§ 211-212 (1974). See also J.G. Sutherland, *Statutory Construction*, §§ 65.01-65.02 (4th Ed. 1972).

See *California Packing Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 204 I.C.C. 741, 744 (1934).

Another significant element contributing to the erroneous action of the ICC and, in turn, the Court of Appeals is the confusing insertion of the concept of per diem into a case involving the totally unrelated subject of demurrage. Per diem is a charge imposed by car owners as compensation for the use of their cars on the lines of other carriers. Car owners are clearly entitled to such compensation and that right has never been questioned in this proceeding. Where the ICC and, in turn, the Court of Appeals became confused, however, is in its attempt to suggest that the per diem reclaim agreement between PTSC and its line-haul connections somehow has a bearing on the right of PTSC to collect demurrage charges from the shipper who uses the tracks of PTSC for the storage of rail cars employed in its service.

Contrary to the misunderstanding reflected in the opinion of the Court of Appeals, per diem reclaim is not an unusual or special concession but a common, industry-wide practice. The per diem reclaim agreement between PTSC and its trunk line connections is governed by Rule 5 of the Car Hire Rules of the Association of American Railroads. Those rules, which are sanctioned by the ICC, constitute a contract of adhesion published by the line-haul carriers. Per diem reclaim is a recognition of the gross inadequacy of switching absorptions and is intended as supplemental compensation to the switching carriers in order to reduce the volume of paper work and circular flow of funds between the line-haul carriers and the switching carriers. If per diem reclaim was not provided, the switching lines would have to pay per diem to their line-haul connections and then assess increased charges for performance of switching services. Per diem reclaim has

developed as the custom of the trade in order to reduce these offsetting payments and their attendant paperwork burden.

What is important in the context of this case is the fact that PTSC's entitlement to per diem reclaim existed long before the publication of the tariff provision which is at issue in this proceeding. Thus, PTSC's entitlement to per diem reclaim is totally unrelated to and in no way contingent upon its right to assess and collect demurrage charges accruing on cars held on its own lines.[4]

Equally important is the fact that, contrary to the Commission's conclusion, the per diem reclaim agreement to which PTSC is a party does *not* completely relieve it of responsibility for all per diem costs. Rather, it provides, consistent with the provisions of Rule 5 of the AAR Car Hire Rules, that per diem may be relieved only up to an average of 120 hours (i.e., five days) per car.[5] Thus, if a shipper should choose to hold cars on demurrage for more than an average of five days, PTSC will now be obligated to pay per diem on those cars for the excess days but will not be able to collect any demurrage on those cars.

How long cars stay on demurrage is, of course, a matter completely within the discretion of the shipper. If the shipper is willing to pay applicable demurrage charges, it may

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[4]The total lack of any such relationship is also evidenced by the fact that PTSC still collects demurrage on all cars other than those containing grain although those other cars are subject to per diem reclaim to precisely the same extent as the grain cars.

[5]The five days reclaim period includes Saturday, Sundays and holidays even though demurrage is not assessed on those days. Thus, the per diem reclaim period can expire before a shipper has incurred significant demurrage charges.

hold cars indefinitely.[6] After the expiration of reclaim, PTSC will become liable to the car owners for per diem on those cars but will have collected no demurrage charges from which to make those payments. Instead, the demurrage charges will have been collected by SCL or SRC. In those instances where the cars are owned by SCL or SRC such revenue will be collected by them *in addition to* per diem paid by PTSC. In those instances where SCL or SRC are not the car owners the demurrage revenues will represent a complete windfall for which they have performed no service nor borne any ownership burdens. This is a situation which is totally alien to the heretofore carefully balanced relationship between connecting carriers. It is a situation which the ICC obviously failed to recognize in its arbitrary determination to overrule the carefully considered decisions of the Administrative Law Judge and the Review Board.

Further insight into the defective reasoning which spawned the decisions below is provided by the suggestion expressed in the ICC decision and echoed in the decision of the Court of Appeals that, to the extent that denial of demurrage to PTSC for services performed by it in the holding of cars results in a revenue shortfall, PTSC can make up for it by increasing its switching charges. Such a practice would require PTSC to impose upon shippers who release cars promptly the burden of underwriting a share of costs attributable to holding of cars for shippers who operate with less efficiency. Such an arrangement would be the very antithesis of the concept of just, reasonable and non-discriminatory treatment of shippers

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[6]Use of rail cars for temporary grain storage is not an unusual practice, particularly at export facilities such as those served by PTSC where grain must be accumulated in sufficient quantities to fill large vessels.

which is the very foundation of the Interstate Commerce Act.

The new policy reflected in the ICC's decision is particularly unfortunate because it will serve only to encourage practices which inure to the detriment of small railroads and shippers who are without sufficient economic leverage to protect themselves from the exaction of charges for which no service is performed. It is not by happenstance that the proponents of the tariff provision which is here at issue are two of the largest and most powerful railroads in the nation and that the targets are a small common carrier and a small shipper with a single facility that has no feasible alternative to the line-haul services of SCL and SRC. Without the regulatory protection heretofore available from the ICC, small carriers such as PTSC will be powerless to resist publication by large, line-haul carriers of tariffs providing for collection by them of charges attributable to services performed by the small carriers.

Furthermore, notwithstanding the loss of charges heretofore paid to them, the terminal lines will have no choice but to continue to absorb the cost of providing and maintaining trackage sufficient for holding cars consigned to the industries that they serve. The alternative would be to handicap the ability of those industries to function and to generate traffic which the terminal carriers depend upon for their survival. The cost of maintaining adequate trackage for holding of cars and providing additional switching necessitated by the congestion which is created when cars are held on demurrage will have to be paid from some source and that source ultimately will be the shippers served by the terminal carriers. This will necessarily create a situation in which the shippers will pay twice for the same facilities and services. They will pay once to the line-haul

carriers for doing nothing and once to the terminal carriers to compensate them for the costs incurred in providing the terminal facilities and services essential to the efficient handling of their traffic.

The decisions of the ICC and the Court of Appeals do not reflect any meaningful recognition or consideration of the full impact of the new rule which the ICC has sanctioned. The ICC, in an effort to explain its abrupt departure from long-established precedent and from the decisions of its Administrative Law Judge and its Review Board, acknowledged that this case presents an issue of general transportation importance. However, it then proceeded with a parochial analysis which reflects an assumption that the impact of the new rule will be limited to one terminal and one grain elevator.[7] Nowhere is there apparent recognition that approval of the new rule will inevitably lead to line-haul carriers subjecting terminal carriers nationwide to the same provisions until the situation becomes intolerable and forces terminal carriers out of business and undermines the intricate structure of the national rail transportation system in which terminal carriers fulfill a vital role.[8]

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[7]SCL and SRC presumably limited the initial applicability of their new rule to one commodity (i.e., grain) in order to encourage the ICC to take just such a limited view which ignores the fact that the precedent established in the context of this proceeding, if permitted to remain in effect, will serve as a license for large and powerful carriers to subject small and defenseless terminal carriers throughout the country to the same practice with respect to cars handling all types of commodities.

[8]The wide ranging significance of the ultimate outcome of this controversy is evidenced by the participation of The American Short Line Railroad Association on behalf of a nationwide membership of hundreds of carriers who are potential targets of the same predatory practice which is here in issue.

Adequate explanation of the ICC's acquiescence in such intolerable burdens on the free flow of commerce cannot be found in its decision. Rather, it seems apparent that the ICC's motivation in abandoning its responsibility to safeguard small carriers and shippers from abusive, selective tariff practices was to demonstrate the existence of a *laissez faire* transportation regulatory environment which it apparently believes to be mandated by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1926 (1980), ("Staggers Act"). However, such a posture is squarely at odds with one of the principal legislative objectives of the Staggers Act. The legislative history of the Staggers Act[9] makes clear that in drafting its provisions:

> ". . . special attention [was given] to insuring that the new regulatory freedoms will not be used to stifle the development of our smaller class II and class III carriers which are an important element, and a growing element, in the national rail network."

and that:

> ". . . it is our intent to promote development of class II and class III carriers and other sections of this legislation are not to be used by the Interstate Commerce Commission or any other entity in a fashion that intends an adverse impact on one or more class II or class III carriers."

and that:

> "Simply put, we do not intend that the various sections of this legislation be used so that the expanded power and flexibility given large carriers

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[9]126 Cong. Rec. H8552-55 (daily ed. Sept. 9, 1980) (statement of Rep. Lee).

> can be applied against class II and class III carriers in an adverse fashion that would impair a smaller carrier's ability to attain financial health."

This is the first case of major national significance (or of "general transportation importance" in the terminology employed by the ICC) which reflects such a clearly misguided reaction to the Staggers Act as it relates to the rights and interests of smaller carriers. As such it provides the court with a unique opportunity to remind the ICC that Congress has neither directed nor authorized it to abdicate its responsibilities to safeguard small carriers and shippers from oppressive actions of huge and powerful line-haul carriers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION

v.

SEABOARD COAST LINE RAILROAD COMPANY [1]

Demurrage charges at issue applicable but the collection of those charges by defendants found unjust and unreasonable. Schedule ordered canceled.

Peter A. Greene and *Norman J. Philion* for complainant.

James L. Howe, III and *Phyllis A. Joyner* for defendants.

By Jerry F. Laughlin, Administrative Law Judge:

By appropriate order of the Commission, the matter was assigned for handling under modified procedure. Subsequently, the proceeding was assigned to this Administrative Law Judge for an initial decision thereon.

By complaint filed December 18, 1979, South Carolina Public Railways Commission (SCPRC or complainant) alleges that a tariff caused to have been published August 6, 1977, in Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F) which reads as follows:

[1] Also named as defendant is Southern Railways Company.

> Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

is in violation of 49 U.S.C. 10107(a) (2) and (3) and 49 U.S.C. 10701, 10750 and 11121, and requests that an order be entered ordering defendants (Seaboard Coast Line Railroad-SCL, and Southern Railway Company-SRC) to cancel such tariff provision.[2]

Complainant is an agency of the State of South Carolina created by an act of the General Assembly of that State whose responsibility is the control and operations of common carrier railroads owned by the State. As here pertinent, complainant controls and operates two Class III common carrier terminal switching railroads in the Charleston, SC port area. These railroads are respectively, Port Utilities Commission of Charleston, SC, (PUCC) and Port Terminal Railroad of South Carolina (PTSC). The PUCC is located in Charleston and consists of approximately 6 miles of track serving private industry and the marine terminals of the South Carolina State Ports Authority in Charleston. The PTSC certificated by the ICC as a common carrier railroad, is located at North Charleston and consists of about 4.6 miles of track serving private industry and the marine terminals of the South Carolina State Ports Authority at North Charleston.

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[2]The above described item, among others, incorporated a number of tariff charges concerning demurrage charges. In Suspension Case No. 67012 the Commission's Suspension and Fourth Section Board decided not to suspend or investigate these items and the Commission, Division 2, denied an appeal and the proposal became effective August 6, 1977. Subsequently, in No. 36927, the Commission, Division 1, one member dissenting, in a proceeding involving the same tariff provision, denied a Petition for Declaratory Order, an action affirmed in a decision served November 20, 1979.

Located at North Charleston is a grain elevator with a capacity of approximately 1.6 million bushels that is on the tracks of and served by PTSC. This elevator is engaged in receiving grain from rail cars which is subsequently transferred to ocean-going vessels for shipment to export markets; about 1,250-1,500 rail cars of grain are received by this facility per year. Rail cars destined to the elevator are received by the PTSC from the line-haul carriers at the PTSC yard at North Charleston. The interchange between PTSC and line-haul carriers occurs pursuant to the AAA rules regarding interchange and freight claim and the Code of Car Service and Car Hire Rules. Upon receipt of the loaded cars, the PTSC notifies the elevator of arrival and depending upon the availability of space will either actually or constructively place the cars; cars constructively placed by the PTSC are held on the tracks of PTSC until actually placed at the elevator. When the cars are unloaded, PTSC removes them. The line-haul carrier is not involved in any way with the placement, holding, handling, release or removal of cars consigned to the elevator. PTSC classifies and delivers the empty cars to the line-haul carriers in the PTSC yard on tracks owned by the PTSC. Since it is in the position, PTSC undertakes determination, assessment and collection of demurrage charges consigned to the elevator. Under the present per diem reclaim agreement, complainant can reclaim all per diem due on all cars of export grain subject to the provision in question. The line-haul carriers it is urged are unable to perform the necessary functions with regards to demurrage as they have no knowledge of the time of actual or constructive car placement or the time of release of the cars. In 1976, 6,819 car days of demurrage were incurred by the elevator. Complainant asserts that substantial operating expenses are incurred (1) maintaining storage tracks and related facilities for the holding of cars that cannot be im-

mediately placed, (2) providing facilities for prompt and efficient handling of cars, and (3) performing records, surveillance and other functions necessary for accurate determination, assessment and collection of demurrage; these expenses are incurred, it asserts, in addition to routine switching of cars. The line-haul carriers absorb a switch charge of $24.25 in connection with the movement of grain, but complainant submits that this charge covers only a part of the normal switching costs and the costs enumerated above are over and above the costs of switching. The cost of additional services must be paid for by the portion of demurrage charges retained by the PTSC. During 1976, the last full year (before publication of the disputed tariff) the revenues of PTSC attributable to demurrage was $125,405 or about 61 percent of the gross revenue for PTSC that year. That revenue, it is said, was not sufficient to cover the costs incurred in the activities related to demurrage. Even with demurrage revenues, PTSC has averaged a loss of $133,302 per year for the four year period 1974-1978.

Complainant argues that the tariff in question is impossible to apply for the reason that since the line-haul carriers serving North Charleston do not actually or constructively place cars at the elevator they cannot determine the applicable demurrage charges; that since the line-haul carriers do not serve the industries they bill, their use of estimates in the calculation of demurrage charges would be inconsistent with respect to the maintenance of proper demurrage records; and that such tariff provision should not prevail in light of the foregoing circumstances. Complainant stresses that it is not in the railroad business by choice or is PTSC operated for the purpose of generating profits, and in order to provide the essential terminal services required by the shipping public who use the port

facilities of North Charleston it must be compensated, at least in part, from revenues accruing from administering and enforcing car demurrage rules.

In their statement defendants submit that there is no justification to complainant's position that demurrage charges collected on foreign grain cars should be its revenue item for the reason that this position ignores the fact that demurrage is part penalty for incentive to encourage prompt release of cars, and, in part an element of compensation for the use of cars for storage, and not primarily as a source of revenue. See *Commerce & Industry Assn. of N.Y., Inc. v. B&D R. Co.*, 281 I.C.C. 655, *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647, and Ex Parte 289, *Remittance of Demurrage Charges*, 353 I.C.C. 567; that concerning the penalty element, the ultimate receiver of demurrage charges collected is immaterial to the person penalized, that relating to compensation, it would be inconsistent for demurrage to be paid to a railroad which does not contribute to the national freight car fleet as it owns no freight cars; and that switching railroads should derive their revenues from switching charges and not from the collection of demurrages. It is argued that it is incredible that complainant takes the position it needs to secure demurrage charges for revenue purposes in face of the provisions in 49 USC 10750 that demurrage charges should be established in a way that fulfills the needs to freight car use and distribution, and maintenance of an adequate supply of freight cars to be available. Defendants suggest that if complainant is in need of additional revenue, it should endeavor to provide it with increased switching charges and charges for storing grain cars should be compensated by duly published storage charges and not through demurrage. It is asserted that there are no facts to substantiate any additional costs

suffered by complainant other than switching and some bookkeeping expenses, that the tariff provision in question is practical and workable and any difficulty in application is due to the refusal of complainant to allow line-haul carriers access to demurrage records; and that such provision is just and reasonable in accordance with 49 USC 10701, 10750 and 11121.

In its reply statement, complainant submits that the tariff provision in question has created an intolerable situation whereby PTSC incurs the expense of providing the facilities and services necessary to comply with the Commission's demurrage rules, but defendants who provide none of the facilities utilized in holding cars at North Charleston nevertheless collect the demurrage charges accruing on cars held on the lines of PTSC, and that it is well established that demurrage charges are properly collectable by the carrier on whose lines cars are held. See *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, and *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83. Complainant avers that contrary to the suggestions posed by defendants, it cannot impose storage charges as a shipper cannot be compelled to pay a storage charge on cars which are already incurring demurrage, nor can switching charges be assessed in connection with handling of cars held on demurrage as a shipper is entitled under applicable line-haul rates to placement of cars for loading and unloading and any handling of the cars prior to such placement is not the shippers' responsibility, and that should complainant obtain the funds necessary to continue to maintain the functions necessary to administer the Commission's demurrage rules, the divided responsibilities and needless handling and transfer of information that would be necessitated by defendants' tariff provision would detract from the efficiency with which demurrage is now accrued and collected.

DISCUSSION AND CONCLUSIONS

The issue to be here resolved is whether the Commission will sanction an arrangement whereby the line-haul carriers collect demurrage charges attributable to demurrage accrued on the lines of a terminal carrier. Manifestly, the Commission has held that demurrage may not lawfully be collected by one carrier when another carrier performs the transportation. On the other hand, the purpose of demurrage charges is part penalty for incentive to encourage prompt release of cars, and, in part to compensate the railroad for use of their cars for storage, and is not considered primarily as a revenue item. The facts reveal that complainant (who owns no rail cars) over its own tracks performs all of the functions necessary for handling the cars to and from the grain elevator, including operations involved in the holding of cars accruing demurrage. Defendants are not involved with the placement, holding, handling or release of the cars. The switching revenues received by complainant are insufficient over the cost of this service and the cost of the additional service, it is claimed, must be defrayed by collection of demurrage revenues. The problem arises as to which party is entitled to the demurrage charges. Based on a point of equity, and in keeping with Commission precedence, a finding must be made on behalf of complainant for the reason that it is complainant, not defendants, who performs all the necessary functions which actually results in demurrage; defendants only contribution is their delivery of the cars to complainant. The revenues collected by complainant for demurrage are considered a source of compensation for the cost of services rendered, rather than a revenue item. In addition to this equitable solution is the fact that the Commission has long held that demurrage charges are properly collectable by the carrier on whose lines cars are

held. Significantly, the prompt release element of demurrage charges is not voided by the finding made herein as it is immaterial to the person penalized who collects such charges so long as the car is released, and the denial of compensation for use of cars for storage (another element of demurrage) is not seriously damaging to defendants considering the minimum efforts expanded by them in serving the North Charleston terminal.

Another matter, it is questionable whether defendants, since they do not serve the industries they bill, can accurately assess the proper demurrage charges in the absence of documents necessary to reflect such charges.

In reaching the conclusions herein, proper consideration has been duly given to Ex Parte 289, *Remittance of Demurrage Charges, supra - Commerce & Industry, supra,* and *Ormet Corp., supra.* Any other issue raised and not discussed nevertheless has been considered.

FINDINGS

Upon consideration of all evidence of record, the Administrative Law Judge finds that the demurrage charges at issue (reflected in Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F)) applicable, but the collection of those charges by defendants found unjust and unreasonable.

Premises considered, it is the ORDER of the Administrative Law Judge that the provisions of the issue tariff be canceled.

The Administrative Law Judge further finds, That this action will not significantly affect either the quality of the human environment or consideration of energy resources.

Dated at Washington, DC, this 18th day of June, 1980.

/s/
By the Commission, Jerry F. Laughlin, Administrative Law Judge

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION

v.

SEABOARD COAST LINE RAILROAD COMPANY ET AL.[1]

Decided December 19, 1980

Defendants, Seaboard Coast Line Railroad Company (Seaboard) and Southern Railway Company (Southern), filed an administrative appeal to the initial decision of the Administrative Law Judge (ALJ) served June 24, 1980. Complainant South Carolina Public Railways Commission replied.

At issue is the lawfulness of item 380(F), Supplement 196, Southern Freight Association, Agent, Tariff 988-A, ICC S-909. This item essentially provides that demurrage charges paid shall accrue to the account of the in-bound line-haul rail carrier and not the terminating railroad. It applies generally on carloads of grain for export from South Atlantic, South Florida and Gulf Ports east of the Mississippi River, and has been in effect since August 6, 1977.

The ALJ found that the assailed tariff item was unlawful and ordered that it be canceled. We affirm this finding. However, the appeal requires a more detailed discussion of certain issues.

[1]Also named as a defendant is Southern Railway System.

At Charleston the complainant operates two terminal switching railroads: Port Utilities Commission of Charleston, SC (PUCC) and Port Terminal Railroad of South Carolina (PTSC). PUCC operates about 6 miles of track in Charleston proper. PTSC operates 4.6 miles of track in North Charleston. Both serve private industry and the State's respective marine terminals.

The controversy between the parties concerns whether the line-haul carriers or PTSC should receive the demurrage charges that accrue on the carloads of grain which the line-haul carriers (Seaboard and Southern) interchange with PTSC at its North Charleston yard for terminal switching and delivery. After receiving the cars from the line-haul carriers, PTSC moves them to the local grain elevator which transfers the grain to ocean-going vessels for export. Upon receipt of the loaded cars, PTSC notifies the elevator of arrival and, depending upon the availability of space, either actually or constructively places the cars at the elevator. Cars constructively placed by PTSC are held on its tracks until actually placed at the elevator. After unloading, PTSC removes, classifies, and delivers the empty cars to the line-haul carriers at its North Charleston yard.

The Southeastern Demurrage and Storage Bureau (Demurrage Bureau) now assesses and collects all demurrage charges on cars consigned to the elevator.[2] It does so based on the detention records of PTSC, but for the accounts of Seaboard and Southern.

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[2]The demurrage charges are made applicable pursuant to item 130 of Seaboard Coast Line Railroad Company Tariff, ICC SCL 8031-B, to which PTSC and PUCC are parties. Tariff 8031 is made applicable to the movements at issue by reason of the "omnibus clause" published in the subject line-haul export tariff.

In 1978, the defendants owned 75.4 percent of the grain cars carrying traffic exported from Charleston, other railroads owned 22 percent, and 2.6 percent were shipper owned. PTSC and PUCC pay per diem charges on the considered traffic but offset most of this money pursuant to a per diem reclaim agreement. During the period August 1, 1977 through December 31, 1978, the cars delivered to PTSC and PUCC at Charleston by Seaboard earned $131,930.94 in per diem charges. During that period the two switching carriers had reclaim charges of $129,029.85 resulting in a net balance of $2,901.09 which they paid to Seaboard.

DISCUSSION AND CONCLUSIONS

Defendants argue that the assailed tariff provision has been approved by this Commission. They note that the Commission did not suspend the tariff item when it was initially published. They also cite No. 36927, *South Carolina Public Railways Commission - Petition for Declaratory Order* (not printed), decided November 14, 1979, where Division 1 refused to institute a declaratory order proceeding to address the lawfulness of item 380(F). Defendants characterize this decision as a finding that item 380(F) is just and reasonable. There is no merit to this contention. As Division 1 noted in No. 36927, the appropriate means of challenging the tariff item was to file a complaint under 49 U.S.C. 11701. That complaint is now before us.

Defendants also contend that Commission precedent does not support the ALJ's finding that the tariff rule is unreasonable. We disagree. The Commission has frequently stated that demurrage charges are both *assessed* and *retained* by the carrier *on whose line the detention oc-*

curs. See, e.g., *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971).

The terminating carrier is justified in keeping these charges because of operational and practical reasons surrounding their assessment and collection. Thus, its tracks have been turned into a temporary warehouse for which it should be compensated. Additional handling is necessitated for cars on constructive placement and costs are incurred in accounting for these cars as well as assessing and collecting these charges. Moreover, because the cars are detained on its tracks, the terminating railroad is in the best position to develop accurate information as to the actual and constructive placement and release of those cars.

Defendants argue that if the terminating carriers were to collect and keep the demurrage charges, they would have an economic incentive to delay the release of the cars. This argument is specious. The amount of demurrage to be collected is governed by the time expiring between the placement and release of the cars. Naturally, the consignee wants to release the cars as fast as possible to avoid paying excessive demurrage. Once the cars are released to the terminating carrier, that carrier has no reason to delay returning the cars to the line-haul carrier.

Defendants object to the terminal carrier at Charleston being allowed to keep the demurrage charges because it "pays no per diem." As noted above, both PTSC and PUCC pay per diem charges, but these payments are offset by reclaim charges and thus the balance due defendants is usually rather small. But the defendants are confusing the purpose of demurrage charges with the purpose of per diem charges. Per diem charges represent rental payments

by one railroad for the use of cars belonging to another railroad. Defendants emphasize the fact that they own the preponderance of the considered grain cars, and argue that the car owners should collect the demurrage charges because they provide "compensation to the carrier for the cost of the car." On the contrary, it is the per diem charges which are paid to car owners as a fair compensation for the use of equipment. See *Charleston Port Utilities Com. v. Baltimore & C.S.S. Co.*, 155 I.C.C. 365, 370 (1929). If the defendants are dissatisfied with the amount of compensation they receive for use of their cars from the switching carriers at Charleston, their proper remedy is to renegotiate the per diem reclaim agreement with those carriers.

In view of these considerations, we conclude that publication of tariff item 380(F) constituted an unreasonable practice violative of 49 U.S.C. 10701.

Arguments and requested findings not discussed in this decision nor reflected in our findings or conclusions have been considered and found not justified.

We find:

The evidence considered in the light of the administrative appeal and reply does not warrant a result different from that reached by the Administrative Law Judge. His statement of facts, conclusions and findings, as supplemented, being proper and correct in all material respects, are affirmed and adopted as our own. This decision does not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The administrative appeal is denied. Defendants shall cancel para. (F) of item 380 within 35 days from the date of service of this decision. This proceeding is discontinued.

By the Commission, Review Board Number 4, Members FitzPatrick, Fisher, and Dowell.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION v. SEABOARD COAST LINE RAILROAD COMPANY[1]

Decided December 3, 1981

Rights to demurrage charges as between line-haul and terminal carriers discussed and tariff rule interpreted.

Peter A. Greene and *Norman J. Philion III* for complainant.

James L. Howe III and *Phyllis A. Joyner* for defendants.

DECISION

By the Commission:

BACKGROUND

This proceeding has been reopened for administrative review on the present record by decision served May 11, 1981, wherein this Commission found that this proceeding involves matters of general transportation importance.

The central issue concerns whether a specific tariff provision which provides that demurrage charges should accrue to the line-haul carrier rather than terminal switching

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[1]Also named as a defendant is Southern Railway System.

carrier is reasonable. The facts are set out in the prior decisions and will be restated only to the extent necessary to clarify our reasoning.

Complainant/respondent is an agency of the State of South Carolina and operates two terminal switching carrier in the Charleston, SC port area: the Port Utilities Commission of Charleston (PUCC); and the Port Terminal Railroad of South Carolina (PTSC). Defendants/petitioners are two line-haul carriers serving the Charleston port area: the Seaboard Coast Line Railroad Company (SCL); and the Southern Railway Company (SRC).

The controversy concerns whether the line-haul or terminal switching carriers should retain demurrage charges that accrue on the carloads of grain that the line-haul carriers interchange with PTSC at its North Charleston yard. The PTSC and PUCC own no cars, but perform all the necessary functions for the ultimate delivery of the cars, including notifying the elevator and actual or constructive placement of the cars for unloading.[2] After unloading, PTSC removes, classifies, and delivers the empty cars to the line-haul carriers at its North Charleston yard. The Southeastern Demurrage and Storage Bureau now assesses and collects all demurrage charges on cars consigned to the elevator. It does so based on the detention records of PTSC, but for the account of the line-haul carrier.

The demurrage charges accrued to the line-haul carriers in accordance with paragraph (f) of item 380 series to Southern Freight Association, Agent, Southern Grain Export Tariff 988-A, ICC S-909, first published in supple-

[2]Actual or constructive placement occurs at the first 9 a.m., excluding Saturdays, Sundays and holidays, following the date on which the cars are interchanged with the switching carriers.

ment 196, effective August 6, 1977. This item provides that:

> Cars shall remain in the demurrage account of the imbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

Complainant claims that this item is (1) impractical and unreasonable in that only the switching carrier is in a position accurately to determine, assess, and collect demurrage charges, and (2) an unjust and unreasonable practice in violation of 49 U.S.C. 10701, 10750 and 11121.[3]

There have been two prior decisions in this proceeding. In an initial decision served June 24, 1980, the Administrative Law Judge found that while the tariff provision allowing the line-haul carriers to retain demurrage was legally applicable, it was unlawful. He ordered the published tariff provision canceled.

The Administrative Law Judge relied on Commission precedent holding that demurrage charges are properly retained by the carrier on whose line the cars are detained. He also found that demurrage cannot lawfully be retained by one carrier when another carrier performs the transportation. Applying equitable principles and Commission precedent, the Administrative Law Judge reasoned that the terminal switching carriers deserved the demurrage

[3]The terminal switching carriers formerly retained the demurrage charges to compensate them for switching and other terminal costs in excess of that absorbed by the line-haul carriers or recovered through per diem reclaim. The record fails to explain the reasons the carriers were unable to negotiate a new arrangement in view of the issue tariff provision, or why the prior arrangement was used. Thus we can only consider the lawfulness of the tariff item under the parties' present reclaim and switching arrangements. The previous arrangements are outside the tariff and beyond the scope of our inquiry.

because they performed all the necessary functions which actually result in demurrage. The line-haul carriers only contribution was their delivery of cars to the switching carrier. The Administrative Law Judge also questioned whether the line-haul carriers could accurately assess the proper demurrage charges since they do not serve the industries they bill.

The line-haul carriers appealed, but Review Board Number 4 affirmed the Administrative Law Judge's prior decision. Because it found that the Administrative Law Judge did not adequately discuss the question of demurrage as compensation to the car owner, the review board more fully addressed this issue.

The review board noted that of the grain cars delivered to the terminal switching lines, the defendants owned 75.4 percent, other railroads owned 22 percent, and 2.6 percent were shipper owned. It also found that the terminal switching carriers paid per diem charges on the considered traffic but offset virtually all of this money pursuant to a per diem reclaim agreement. During the period August 1, 1977 through December 31, 1978, the cars delivered to PTSC and PUCC at Charleston by Seaboard earned $131,930.94 in per diem charges. During that period the two switching carriers had reclaim charges of $129,029.85 resulting a net balance of $2,801.09 which they paid Seaboard.

In response to the line-haul carriers' argument that the terminal switching carriers should not be allowed to keep the demurrage charges because the switching carrier "pays no per diem," the review board stated that the switching carriers did in fact pay per diem charges but that these payments were offset by reclaim charges and thus the balance due defendant line-haul carriers was rather small.

The review board indicated that the defendants were confusing the purpose of demurrage charges with the purpose of per diem charges, in that per diem charges represent rental payments by one railroad for the use of cars belonging to another railroad, and thus the line-haul carriers were in fact being compensated by per diem payments. The review board added that if defendant line-haul carriers were dissatisfied with the amount of compensation they receive for use of their cars from the switching carriers at Charleston, their proper remedy is to renegotiate the per diem reclaim agreement with those carriers.

We disagree with the prior decisions and find that the assailed tariff item is lawful.

DISCUSSION

This proceeding presents the novel issue of whether the line-haul carrier or terminal switching carriers are legally entitled to retain demurrage collected from shippers whose facilities are located on the tracks of the switching railroads. The Commission has never ruled on the legality of such a demurrage provision because line-haul carriers and terminating lines usually agree on how the switching carrier will be compensated for its services.

To resolve the lawfulness of the instant tariff provision we must consider the purposes of demurrage, Commission precedent, and the legal and financial relationship between the carriers.

Demurrage is a charge that a shipper/consignee pays a rail carrier for the detention of cars beyond a period of free time. It is well established that demurrage charges

consist of two components. In *Turner Lumber Co. v. C.M. & St. P. Ry.*, 271 U.S. 259, 262; Mr. Justice Brandeis outlined the purposes:

> All demurrage charges have a double purpose. One is to secure compensation for the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against detention.

We have frequently stated that demurrage is both assessed and retained by the carrier on whose line the detention occurs. See *e.g., Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). When detention occurs at the end of a multicarrier movement the delivering carrier traditionally collects and retains all demurrage payments. *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *Baltimore & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1978). These general principles reflect the underlying rationale that the carrier who incurs the costs associated with the detention of cars should be compensated by demurrage. See *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, 580 (1934).

We have reviewed the legal and financial relationship between the line-haul carriers and terminal switching carriers and conclude that the line-haul carriers are the delivering carriers and thus legally entitled to demurrage.

It is common practice for terminal carriers to act as agents for line-haul carriers. *A. F. Pringle & Co., Inc., v. Atlantic Coast Line R. Co.,* 278 I.C.C. 655, 657 (1950). The facts of this case lead us to conclude that the switching roads are agents of the line-haul carriers. This agency relationship is found to exist in part because of the line-haul

carriers' absorption of switching charges.[4] Also the facts that the bills of lading were issued in the names of line-haul carriers and switching carriers do not publish a joint rate or share in the division of that rate are indicia of an agency relationship. See *Missouri Pacific Railroad Company v. Reynolds Davis Grocery Co.*, 268 U.s. 366 (1925); *Trucking L. C. L. Freight in Lieu of Rail Service*, 185 I.C.C. 71, 73 (1932); and *Allied Asphalt & Mineral Corp. v. Hoboken ...jrs.' R. Co.*, 194 I.C.C. 265, 267 (1933).

Another factor that indicates an agency relationship is the existence of a per diem reclaim agreement between the line-haul carrier and the terminal switching carriers. Under per diem reclaim line-haul carrier makes an allowance for the car-hire charges (per diem charges) that the switching carrier is assessed on cars that are switched, loaded and unloaded. The purpose of per diem reclaim is fully to compensate the switching carrier with respect to rental paid for those cars that are handled by the switching carrier as part of a through line-haul movement. *New Orleans Public Belt R. Switching and Absorptions*, 235 I.C.C. 613, 624 (1939).[5]

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[4]Apparently at the time of the filing of the complaint there was total absorption of the switching charges by the line-haul carriers. Subsequently, the swtiching charges were increased without a concurrent increase in the line-haul carriers' absorption, resulting in partial absorption. The fact that there is partial absorption, rather than total absorption of the switching charges, does not preclude an agency relationship given the other indicia of agency present in this case.

[5]We find that the review board erred in stating that the two switching carriers pay per diem on the considered traffic but offset most of this money pursuant a per diem reclaim agreement. Defendants' reply shows that the net balance of $2,901.09 paid to the Seaboard has nothing to do with any cars involved in grain as considered in this proceeding but resulted from cars used in interterminal switching service which was exempt from the reclaim agreement. Accordingly, we find that the per diem reclaim totally offset per diem payments owed by the switching carriers to the line-haul carriers. See

All the above facts clearly make the terminal switching carriers agents of the line-haul carriers for purposes of determining which set of railroads is the "delivery carrier." It is the line-haul carrier who is contracting with the shipper/consignee and consequently the line-haul carrier is the delivering carrier and in a position to determine who is to receive demurrage. Furthermore, it is the line-haul carrier who is incurring the car-ownership costs associated with the detention of cars because of the per diem reclaim agreement. The line-haul carrier owns 76 percent of the cars used in the switching, loses the use of those cars when they are detained, and pays per diem or car rental charges on the remaining cars being detained.

While it is true that the switching lines do incur some costs for use of their tracks during the time cars are detained, these costs do not compel a finding that the retention of demurrage charges by the line-haul carriers is unreasonable. The line-haul carriers incur per diem and rental expenses on the roughly 24 percent of the cars owned by other railroads or by shippers because the per diem reclaim arrangement completely relieves the switching carriers of responsibility for per diem costs. Similarly, for the 76 percent of the cars owned by the line-haul carriers, a finding in favor of the switching railroads would leave the line-haul carriers entirely uncompensated for the shippers' use of those cars for storage during the time the cars are detained. The line-haul carriers have no way to recover those losses. In contrast, the switching carriers can raise their switching charges if that is necessary to cover the expenses they incur in providing the switching service. Also

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also *Federal Barge Lines, Inc.*, v. *Alton & S.R.*, 303 I.C.C. 669, 672 (1958); and *Increased Per Diem Charges on Freight Cars*, 268 I.C.C. 659, 672 (1947).

we note that the switching carriers incur some expenses in the recordkeeping associated with demurrage. However, such expenses are minor when compared to car ownership costs and are not sufficient to warrant a finding that the demurrage provision is unreasonable.

We also disagree with the review board's other reasons for allowing the terminal switching roads to retain the demurrage charges. The review board dismissed defendants' argument that permitting complainant to retain the demurrage would not encourage quick release of the cars. This issue is relevant in connection with the second purpose of demurrage, i.e., to ensure prompt return of equipment to service. We disagree with the board's unqualified conclusion that complainants have no reason to delay returning the cars to the line-haul carrier. While we agree there is no reason to *delay*, it is also true that there is no economic incentive to *expedite* the transfer of equipment. Under the per diem reclaim arrangement, the terminal carrier does not pay any car costs for holding the equipment less than 5 days. Allowing complainants to retain the demurrage as well would do nothing to improve the situation. Such a result does not contribute to efficient rail operations.

This interpretation is consistent with 49 U.S.C. 10750 which provides that demurrage must be computed and administered "in a way which fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance or an adequate supply of freight cars to be available for transportation of property."

The complainant additionally argues that it is more administratively practical for it to collect the demurrage. Because only it is in a position accurately to determine the amount of demurrage owed, complainant argues, it

should therefore collect the demurrage charges. The board accepted this analysis; we disagree. The Southeastern Demurrage and Storage Bureau, of which the parties are members, presently assesses the demurrage charges. It does so based on the records of the PTSC and PUCC but for the account of the line-haul carriers. Complainant has not convinced us that this has not been and is not an administratively workable arrangement. Accordingly, we find unsubstantiated complainant's charge that the item is administratively impractical.

We find that the assailed tariff item which provides that demurrage charges shall accrue to the account of the inbound line-haul carrier is not unreasonable or otherwise unlawful in this particular situation. In this case, defendants have shown that, under the per diem reclaim agreement, the terminal carrier bears none of the car ownership cost. The terminal carrier here is compensated through its switching and terminal charges for the services it provides. Given this set of facts and the agency relationship, we do not believe complainant is entitled to retain the demurrage charges.

At the same time, the terminal carriers are not precluded from recovering their total costs through mechanisms other than demurrage. The most obvious method is a change in the switching agreement and charges. However, any adjustments and additional charges necessary for PTSC and PUCC fully to recover their costs through other means are for the carriers to resolve, and are not proper issues in this proceeding. The fact that complainants may not now be recovering their full costs does not justify their retention of the demurrage charges, under the circumstances here, as a substitute for their failure to use other means to recover their costs. As we have often stated, demurrage is not primarily a source of added

revenues to carriers. *Commerce & Industry, Assn. of N. Y., Inc., v. B. & O. R. Co.*, 281 I.C.C. 655, 659 (1951).

We find:

Complainant has failed to show that the assailed tariff item is unlawful.

It is ordered:

The review board decision is reversed. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice-Chairman Clapp, Commissioners Gresham and Gilliam.

Agatha L. Mergenovich,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1923

STATE OF SOUTH CAROLINA
AND
SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Petitioners,

AND
THE AMERICAN SHORTLINE RAILROAD ASSOCIATION,
Petitioner Intervenor,

v.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Respondents,

AND

SEABOARD COAST LINE RAILROAD COMPANY
AND
SOUTHERN RAILWAY COMPANY,
Respondent Intervenors.

On Petition for Review of a Decision of the Interstate Commerce Commission

---

Argued March 3, 1982. Decided: June 30, 1982

Before HALL and SPROUSE, Circuit Judges, and ROBERT D. POTTER, United States District Judge for

the Western District of North Carolina, sitting by designation.

Frank K. Sloan, Deputy Atty. Gen., Columbia, S.C., and Peter A. Greene, Washington, D.C. (Archibald Wallace, III, Richmond, Va., Daniel R. McLeod, Atty. Gen., Columbia, S.C., Thomas C. Dorsey, V.P. and General Counsel, Am. Short Line RR. Assn., petitioner-intervenor, on brief) for petitioners.

Lawrence H. Richmond, I.C.C., Washington, D.C., (William F. Baxter, Asst. Atty . Gen., Robert S. Burk, Acting Gen. Counsel, Henri F. Rush, Assoc. Gen. Counsel, John J. Powers III, and Kenneth P. Kolson, Washington, D.C., on brief) for respondents.

John Charles Thomas, Richmond, Va. (T.S. Ellis, III, Richmond, Va., Richard A. Hollander, Seaboard Coast Line RR. Co., Richmond, Va., and James L. Howe, III, Southern Rwy. System, Washington, D.C. on brief) for respondent-intervenors.

PER CURIAM:

Petitioners seek review of a decision by the Interstate Commerce Commission (I.C.C.) that the line-haul carriers and not the terminal switching carriers are legally entitled to demurrage charges paid by the shipper. Petitioners contend that the tariff which imposes this pay arrangement is unlawful, unjust, and unreasonable and that the decision of the I.C.C. is unsupported by substantial evidence and is an unexplained, radical departure from agency precedent. We disagree.

PROCEDURAL HISTORY

In 1979, petitioner, South Carolina Public Railways Commission, which operates two terminal railroads ("switching lines") at Charleston, South Carolina,[1] filed a complaint against respondent-intervenor railroad companies ("line-haul carriers") with the I.C.C. The relief requested was the cancellation of a tariff item which respondent-intervenors "caused to have published," effective August 6, 1977.

The Administrative Law Judge and the Board of Review, on appeal, held the tariff item to be unjust and unreasonable. However, the Commission rejected the examiner's findings and reversed the decision of the Review Board. It is this decision by the Commission, which petitioners contend should be set aside, and which is a final and reviewable agency action under 5 U.S.C. § 704 (1970). This Court must defer to the final decision of the Commission, unless we find it to be "arbitrary, capricious, an abuse of discretion . . . [or] unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E) (1970).

BACKGROUND

Respondent-intervenors, the line-haul carriers, interchange carloads of grain with the switching lines, which petitioner SCPRC operates at its North Charleston, South Carolina yards. The switching lines then notify the shipper, South Carolina Farm Bureau Marketing Association, and either place the rail cars for unloading at the shipper's grain elevator or hold the cars until such placement is

[1]The two switching lines are the Port Terminal Railroad of South Carolina (PTSC) and the Port Utilities Commission of Charleston (PUCC). Most of the facts developed in this case center upon PTSC.

possible. For this service and the attendant maintenance costs, the switching carriers charge the line-haul carriers a switching fee.

Ordinarily, when one railroad uses cars belonging to another, a rental payment or *per diem* is assessed. However, switching carriers may negotiate agreements with the line-haul carriers whereby the *per diem* otherwise owed for line-haul cars used by the switching lines would be refunded in lieu of a switching fee.[2] The amount of the refund would necessarily depend upon the amount of the switching fee. This negotiation is known as a "*per diem* reclaim agreement."

A shipper that detains cars unnecessarily is using rail cars as warehouses and impeding efficient rail service. To deter such conduct and to secure compensation for the use of both the rail cars and the tracks, the shipper must pay a demurrage charge for each day a rail car is detained beyond a 24-hour "free time" period, until the car is returned to the line-haul carriers.[3] The carriers normally agree as to whom the demurrage should be paid. Prior to August 6, 1977, the demurrage charge in this case was paid by the shipper to the switching carriers. However, under the tariff item in dispute, this charge is collected by the line-haul carriers. Therefore, the switching carriers are able to collect from the line-haul carriers a switching fee and/or a refund of *per diem*. The switching carriers are prevented by tariff from collecting demurrage from the shipper.

---

[2]Rule 5, Car Hire Rules of the Association of American Railroads, See, *New Orleans Public Belt R. Switching and Absorption*, 235 I.C.C. 609, 624, (1939).

[3]See generally, *I.C.C. v. Oregon Pacific Industries, Inc.*, 420 U.S. 184, 95 S.Ct. 909, 43 L.Ed.2d 121 (1975); *Manongahela Power Co. v. I.C.C.*, 640 F.2d 504 (4th Cir. 1981).

DISCUSSION

The I.C.C. upheld the tariff item in dispute which states:

> "Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released."

Paragraph (f) of Item 380 Series to Southern Freight Association, Agent, Southern Grain Export Tariff 988-A, I.C.C. S-909, first published in Supplement 196, effective August 6, 1977.

The decision was based upon two findings:

(1) the line-haul carrier is the delivering carrier, entitled to demurrage.

  (a) the switch line is the agent of the line-haul carrier in the delivery of the rail cars.

  (b) the line-haul carriers incur the expenses associated with unnecessary detention of rail cars.

(2) the tariff is not unjust, unreasonable, or unlawful in its application.

If these findings are supported by substantial evidence and are not arbitrary or capricious, the decision of the I.C.C. must be upheld.

There are two factors that the I.C.C. considers for the collection of demurrage. The first is the line upon which the detention occurs. *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). This is the factor which petitioners contend mandates reversal, since it is uncontested that the detention occurs on the switching lines.

However, the remaining factor, the "delivering carrier" determination, supports the validity of the tariff item.

When detention of rail cars occurs at the end of a multicarrier movement, the demurrage charges are traditionally collected by the "delivering carrier." *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *B & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3d Cir. 1978), *cert. denied,* 440 U.S. 968 (1978). The determination of which line is the "delivering carrier" is a two-step analysis. First, the relationship between the line-haul carriers and the switching carriers is examined for indicia of agency. Second, the carrier incurring the costs associated with the detention is identified.

The I.C.C. found that the switching carriers were not "delivering carriers," but merely their agents. In this case, only the line-haul carriers and the shipper were named in the bills of lading. Therefore, the switching lines must operate as the agents of one of the parties named in the bills of lading. *Missouri Pacific R.R. Co. v. Reynolds Davis Grocery Co.,* 268 U.S. 366, 69 L.Ed. 1000, 45 S.Ct. 516 (1925). The line-haul carriers and the switching carriers do not divide a single rate or present a joint rate to the shipper. Instead the line-haul carriers absorb, to a great extent, the switching fees, demonstrating that the switching lines have an agency relationship with the line-haul carriers, rather than maintaining an independent contractor status. *Sioux City & N.O. Barge Lines, Inc. v. Chicago & N.W. Ry. Co.,* 303 I.C.C. 537, 545-46 (1958). The switching lines' independent status is further weakened by the evidence of total reclaim of any *per diem* otherwise owed by the switching lines to the line-haul carriers. Terminal carriers are commonly agents for the delivering carrier [*A.F. Pringle & Co. v. Atlantic Coast Line R.R.*

Co., 278 I.C.C. 655, 657 (1950)], and the I.C.C. based its finding of agency in this case upon substantial evidence and precedent.

The second step in determining which line is the "delivering carrier" is to find the carrier which incurs the costs associated with the detention of the rail cars. *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, 580 (1934). In the case at bar, the line-haul carriers must pay *per diem* on approximately 22% of the cars used since they are owned by other carriers, although no *per diem* is received from the switching lines under the *per diem* reclaim agreement. Further, it is the line-haul carriers which lose the operation and revenue generation of the cars detained; the revenue-generating activities of the switching lines continue during detention. Therefore, the determination that the line-haul carriers are the "delivering carriers," legally entitled to collect demurrage, is substantially supported by the record and prior decisions of the I.C.C.

Petitioners maintain that the imposition of the tariff item is unjust, unreasonable, and unlawful. Their primary concern is loss of "revenue" obtained from the demurrage charges. Demurrage is not "revenue" for carriers [*Commerce and Industry, Assn. of New York, Inc. v. B. & O.R.R. Co.*, 281 I.C.C. 655 (1951)]; it is a deterrence and compensation for both cars and tracks. Petitioners may apply for increased revenues through switching fees or other separate charges. Petitioners also object to the new procedures for assessment and collection of demurrage charges under the tariff item; however, no evidence presented contradicts the conclusion of the I.C.C. that a workable arrangement exists. Finally, petitioners contend that the tariff is unlawful because it encourages delay, impeding efficient "freight car use and distribution and

maintenance of an adequate supply of freight cars for transportation." 49 U.S.C. § 10750 (1978). The weakness of this argument is that the shipper controls the flow of rail cars and pays the demurrage for delay. The decision to permit one carrier over another to collect the demurrage has a neutral effect upon the motivation of the shipper to avoid the charges by efficient rail use.

We find the decision by the I.C.C. to uphold the validity of tariff item 380(f), is supported by substantial evidence and is not arbitrary nor capricious.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

June 30, 1982

TO:

Archibald Wallace, III, Esq.
Daniel R. McLeod, Esq.
Frank K. Sloan, Esq.
T. S. Ellis, III, Esq.
John Charles Thomas, Esq.
James L. Howe, III, Esq.
Lawrence H. Richmond, Esq.
James L. Howe, III, Esq.
Lawrence H. Richmond, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 81-1923 this date.

The Court's opinion is enclosed.

PETITION FOR REHEARING (FRAP 40)

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict in order merely to reargue the case is an abuse of the privilege.

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

A party to whom costs are allowed, who desires taxation of costs, shall filed a bill of costs within 14 days after judgment.

MANDATE (FRAP 41)

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

William K. Slate, II
Clerk

APPENDIX F

Section 10750 of the Revised Interstate Commerce Act, 49 U.S.C. § 10750, provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules related to those charge, in a way that fulfills the national needs related to—
>
> (1) freight car use and distribution; and
>
> (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

Section 11707(a)(1) of the Revised Interstate Commerce Act, 49 U.S.C. § 11707(a)(1), provides:

> (a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent

foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,

No. 82-516

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Commission properly permitted line-haul railroads instead of terminal switching railroads to retain demurrage charges collected from shippers for the prolonged retention of cars owned or paid for by the line-haul carrier but kept on the tracks of the terminal switching carrier.

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In the Supreme Court of the United States

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STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a-35a) is not reported. The opinions of the administrative law judge (Pet. App. 1a-9a) and the Review Board (Pet. App. 10a-15a) of the Interstate Commerce Commission are not reported. The Commission's opinion (Pet. App. 16a-26a) is reported at 365 I.C.C. 274.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1982. The petition for a writ of certiorari was filed on September 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A railroad assesses demurrage charges against shippers when they fail to unload cars within a specified period. The charges serve two purposes: "One is to secure compensation for the use of the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975), quoting *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926). The period of "free time" and the charges for cars held beyond that period are set forth in the tariff filed with the Interstate Commerce Commission. Accordingly, the demurrage charges are subject to review by the Commission to assure that they are reasonable. 49 U.S.C. (Supp. IV) 10701(a) and 10707(a).

2. Respondents Seaboard Coast Line Railroad Company and Southern Railway are line-haul carriers that deliver grain to elevators in Charleston, South Carolina under a tariff that specifies rates for through movements from the grain's origin to the elevator (Pet. App. 22a). Because the line-haul carriers' tracks end about a mile from the elevator, however, the Port Terminal Railroad of South Carolina, which is an agency of petitioner State of South Carolina, moves the cars on its tracks between the line-haul carriers' tracks and the elevator (*id.* at 3a). The terminal railroad assesses a switching charge on each car, which the line-haul carriers partially absorb (*id.* at 22a).[1]

---

[1] "Absorption" means that the line-haul carrier instead of the shipper pays the switch charge. When the dispute between the terminal railroad and the line-haul carriers arose in 1977, the line-haul carriers absorbed all of the switching charge. By the time of the Commission's final decision in

In 1977, the line-haul carriers ended the terminal railroad's practice of retaining the shipper's demurrage charges by adding to their grain tariff a new rule specifying that the demurrage would be paid to the line-haul carriers (Pet. App. 17a-18a). The terminal carrier, which derived a substantial portion of its revenue from demurrage, petitioned the Commission to suspend the new tariff provision,[2] but the Commission refused. The Commission also denied a request for a declaratory order on the new demurrage rule's lawfulness (*id.* at 2a).

The terminal carrier then filed a complaint against the tariff provision under 49 U.S.C. (Supp. IV) 10701. An administrative law judge found the line-haul carrier's demurrage rule unlawful (Pet. App. 1a-9a). He concluded that the terminal carrier incurred the bulk of the expense in keeping cars on its tracks so they would be available to the grain elevator and thus held that it would be equitable to allow it to retain the demurrage charges (*id.* at 7a-8a). The Commission's Review Board adopted the findings and conclusions of the ALJ and affirmed (*id.* at 10a-15a).

3. The Commission reversed the Review Board's decision and dismissed the complaint (Pet. App. 16a-26a).[3] The Commission applied the principle that the

---

1981, the line-haul carriers were absorbing about two thirds of the charge (Pet. App. 22a).

[2] Pursuant to 49 U.S.C. (Supp. IV) 10707, the Commission can suspend the effectiveness of a proposed tariff for a limited time.

[3] While the request for administrative review by the Commission was pending, the line-haul carriers had sought judicial review of the Board's decision. *Seaboard Coast Line R.R.* v. *ICC*, No. 81-1146 (4th Cir. Feb. 9, 1981). Following the Commission"s decision to review the Board's decision, the

delivering carrier should keep the demurrage charges (*id.* at 21a). The Commission found that the terminal carrier was acting as the agent for the line-haul carriers and thus the latter was the delivering agent. The Commission found support for this conclusion in the facts that all charges were included in one tariff in the name of the line-haul carriers and that the line-haul carriers incur substantial costs when their cars, or cars for which they pay per diem,[4] are detained, and that those costs are not recovered. Accordingly the Commission permitted the line-haul carriers to keep the demurrage charges (Pet. App. 23a, 25a). The Commission did recognize that the terminal carrier also incurs expenses when detained cars congest its tracks, but found that these costs did not entitle

---

court of appeals dismissed the line-haul carriers' petition for review.

[4] Whenever a railroad has on its lines a car it does not own, the railroad must pay a daily fee, known as "per diem," to the car's owner. Because the terminal carrier owns no cars, it must pay per diem on all the cars it switches. As a terminal railroad, however, it is entitled to a refund of per diem charges under a universal railroad industry practice known as "per diem reclaim." On the other hand, per diem reclaim only compensates terminal railroads for their per diem payments. *New Orleans Public Belt Railroad Switching & Absorptions*, 235 I.C.C. 613, 623-624 (1940), and has nothing to do with the charges terminal railroads assess for their switching service. *Car Rental and Switching at Memphis*, 286 I.C.C. 553, 555 (1952).

In this case, the line-haul carriers refund to the terminal carrier the first five days of per diem charges. This arrangement entirely compensates the per diem expenses, because the terminal carrier has never had cars such as those at issue in this case on its lines for more than five days (Pet. App. 22a n.5).

it to keep the demurrage charges because the terminal carrier could raise its switching charges to cover the expenses it incurs in rendering its services to the grain elevators (*ibid.*).

4. The court of appeals affirmed (Pet. App. 27a-34a). It held that the Commission's determinations that the terminal carrier is the line-haul carriers' delivery agent, and that the line-haul carriers bear the detention costs, are "substantially supported by the record and prior decisions of the I.C.C." (*id.* at 32a-33a). The court rejected petitioners' various contentions that the line-haul carriers' demurrage rule is unreasonable in its application (Pet. App. 33a-34a).

ARGUMENT

Petitioners contend (Pet. 6) that the Commission's decision is an unexplained departure from the precedent governing collection of demurrage charges and will undercut efficient rail car utilization and terminal railroads' ability to render adequate service. These claims are without merit.

As petitioners acknowledge (Pet. 7), this case is governed by the well-established principle that the delivering carrier should be compensated by demurrage, and that the delivering carrier is the railroad that incurs the costs of detention. The Commission applied this principle and found that the line-haul carriers incur otherwise unrecoverable costs when the elevator uses as a warehouse cars that the line-haul carriers own or pay per diem on (Pet. App. 21a, 23a, 25a).[5]

---

[5] Petitioners' argument (Pet. 6, 8-9) that the Commission has sanctioned charges by one railroad for services performed by another is without foundation, because it assumes that

Thus, what petitioners really challenge is the Commission's factual determination that the line-haul carriers bear the costs of detention. Petitioners did not, and do not now, deny, however, that the line-haul carriers incur costs when cars they own or pay per diem on are detained by the elevator. Nor can petitioners dispute that demurrage is designed in part to compensate carriers for exactly the kinds of costs the line-haul carriers incur at Charleston. *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975).[6]

Instead, petitioners argue that the terminal carrier's expenses entitle it to keep the elevator's demurrage payments. The Commission addressed and rejected this argument because it found that the terminal carrier, unlike the line-haul carriers, can at least theoretically recover its expenses by raising its switching charges. This essentially factual determination is reasonable and supported by the record and accordingly was properly upheld by the court of appeals.[7]

---

only the terminal carrier is rendering any "service" and entirely ignores the expense incurred from the grain elevator's use of the line-haul carriers' cars.

[6] Petitioners concede (Pet. 13, 14) that it would be unfair to make a carrier pay per diem on detained cars without also giving that carrier demurrage charges to cover the per diem payments, yet that is exactly the position the line-haul carriers occupied prior to their 1977 tariff change.

[7] There is no merit to petitioners' contention that the Commission has undermined the principles of efficient car utilization. As the Commission (Pet. App. 24a) and the court of appeals (*id.* at 33a-34a) found, and as petitioners concede (Pet. 13-14), the elevator determines how long cars are detained, and which railroad ultimately keeps the resulting demurrage charges has no effect on how quickly cars are released.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1982

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No. 82-516

In The

Supreme Court of the United States

October Term, 1982

STATE OF SOUTH CAROLINA, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF IN OPPOSITION ON BEHALF OF SEABOARD COAST LINE RAILROAD AND SOUTHERN RAILWAY SYSTEM

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Counsel for Respondents

QUESTION PRESENTED

The issue in this case is whether the Court of Appeals for the Fourth Circuit correctly concluded that the Interstate Commerce Commission acted upon a rational basis in ruling that Item 380(F), ICC SFA 4020-A (hereinafter referred to as the "Demurrage Rule") is lawful.[1]

[1] When the Demurrage Rule was first published on August 6, 1977, its official description was Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F). For reasons that have no bearing on this dispute, on March 6, 1979, the description of the Demurrage Rule was changed to the following: ICC SFA 4020-A.

THE PARTIES TO THIS PROCEEDING

Petitioners include the State of South Carolina ("South Carolina"), South Carolina Public Railways Commission ("SCRPC"), and The American Short Line Railroad Association ("American Shortline").

Respondents include the Interstate Commerce Commission ("Commission"), Seaboard Coast Line Railroad Company ("Seaboard"), and Southern Railway Company ("Southern"). Seaboard and Southern are sometimes collectively referred to as "Railroad Respondents."[2]

---

[2] When the dispute over the Demurrage Rule first arose, both Seaboard and Southern were parties to the tariff in which the disputed rule is found. They both remained parties to that tariff until this case was heard and disposed of by the Court of Appeals for the Fourth Circuit in its Case No. 81-1923, the decision that is here challenged by Petitioners. However, on July 7, 1982, Seaboard requested that it be deleted as a participant in ICC SFA 4020-A. Seaboard's name was removed effective August 7, 1982. As a result, Seaboard is no longer a party to the specific tariff that is the subject of this proceeding. Yet, Seaboard continues to have a direct interest in the outcome of this case because the Demurrage Rule itself is incorporated in several other tariffs to which the Seaboard is a party for grain moving through the Port of Charleston, South Carolina. Southern remains a party to ICC SFA 4020-A, however, it has deleted Item 380(F) and republished the Demurrage Rule as Item 580(F).

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In The

Supreme Court of the United States

October Term, 1982

STATE OF SOUTH CAROLINA, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION ON BEHALF OF SEABOARD COAST LINE RAILROAD AND SOUTHERN RAILWAY SYSTEM

I.

PRELIMINARY STATEMENT[a]

This dispute has been heard by the full Commission and the Court of Appeals for the Fourth Circuit. In both instances a detailed factual record was considered along with in-depth legal analysis supplied by the parties. The full Commission ruled that the Demurrage Rule is lawful. The Court of Appeals ruled that no infirmity exists in the Commission's decision. The matter here in dispute has, therefore, been fully and fairly aired and it should not be considered again by this Court.

Rule 17 of Rules of the Supreme Court sets forth guidelines for reviewing a Petition for Writ of Certiorari. The

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[a] References to the materials set forth in Petitioners' Appendix will be in the following form: "App. at . . . . ."
Emphasis is added throughout unless otherwise stated.

case presented by Petitioners does not meet those guidelines. More specifically, there is no allegation here that the Court of Appeals' decision is in conflict with decisions from other circuits. Nor is there any claim that the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. Moreover, Petitioners do not contend that this case involves an important federal question that should be settled by this Court.

On the contrary, this case presents little more than a classic example of a litigant who refuses to accept the thoughtful decisions of two august tribunals. This case has no place on this Court's docket and, as this Brief demonstrates, the Petition for Writ of Certiorari should be denied.

II.

STATUTES INVOLVED

Two statutory provisions have a direct bearing upon the proper disposition of this case. The first is 49 U.S.C. § 10101a (the Staggers Rail Act of 1980) which announces the rail transportation policy of the United States in the following pertinent language:

> In regulating the railroad industry, *it is the policy of the United States Government*
>
> . . .
>
> (4) *to ensure the development and continuation of a sound rail transportation system* with effective competition among rail carriers with other modes, *to meet the needs of the public* and the national defense;
>
> (5) *to foster sound economic conditions* in transportation and *to ensure effective competition and coordination* between rail carriers and other modes. . . .

In addition to the general policy set forth in the preceding quotation, there exists a specific policy with respect to the proper use of demurrage fees. That policy is as follows:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title *shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—*
>
> (1) *freight car use and distribution;* and
>
> (2) *maintenance of an adequate supply of freight cars* to be available for transportation of property.

49 U.S.C. § 10750 (1976).

The policies expressed in these two statutory provisions were faithfully adhered to by the Commission in its consideration of the lawfulness of the Demurrage Rule. The Commission concluded, on the basis of substantial evidence, that only by declaring the rule lawful could the nation's rail transportation policies be implemented.

III.

STATEMENT OF THE CASE

This dispute centers on which of two entities should be permitted to retain demurrage charges that are assessed against the shipper/consignees of certain rail traffic moving through the Port of Charleston, South Carolina. On the one hand, Railroad Respondents, who serve as inbound line-haul carriers for grain shipments moving from distant points to Charleston, contend that the money should be theirs because they either own the cars on which demurrage is assessed or they pay per diem or car rental fees to the actual

owners of the rail cars on which demurrage is assessed. In short, Railroad Respondents contend that since they bear the risks of car ownership they are the proper parties to receive demurrage charges.

On the other hand, Petitioners contend that simply because demurrage charges are assessed while the rail cars are on their tracks they are entitled to retain those charges. Petitioners make this assertion even though they own no rail cars. App. at 7a. Moreover, they make this assertion even though the facts suggest that, prior to the imposition of the Demurrage Rule, the Petitioners relied upon demurrage charges as a means of increasing their revenues. App. at 4a, 25a. As the facts discussed below reveal, Petitioners seek to secure something for doing virtually nothing. Both the full Commission and the Court of Appeals rejected Petitioners' contentions. This Court should likewise deny this Petition.

At the bottom of this matter lies the Demurrage Rule which reads as follows:

> Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

App. at 2a. This rule means that even though demurrage charges are assessed while the rail cars are on the SCPRC's[4] lines the money is to be retained by Railroad Respondents. In the considered opinion of the full Commission, this rule helps to implement the nation's rail policy with regard to efficient utilization of railroad equipment.

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[4] SCPRC owns and operates the Port Terminal Railroad of South Carolina ("PTSC"). Although reference will occasionally be made to PTSC, in all cases where SCPRC is referred to it is meant to include the PTSC.

An explanation of the operation of demurrage along with a review of relevant facts underscores the correctness of the Commission's conclusion. Demurrage is the amount paid by a shipper/consignee for detaining rail cars beyond a period known as "free time." App. at 20a. In this case, free time lasted for 24 hours from the time the rail cars were either actually or constructively placed at the Charleston grain elevator for unloading. App. at 30a. Actual placement is the actual time at which a rail car is placed at the grain elevator. Constructive placement is a fiction. In the context of this case, constructive placement generally occurred at the first 9:00 a.m. following the time at which Railroad Respondents turned the rail cars over to SCPRC. App. at 17a. The key point is that free time expires 24 hours after either actual or constructive placement.

Another important fact concerns an agreement known as a "per diem reclaim provision." Normally, when a carrier's rail cars are on the lines of another carrier the carrier on whose lines the rail cars are located pays per diem on each car. This per diem payment is meant to compensate the car owner for the lost use of its car. If Railroad Respondents' cars are on SCPRC's lines for less than five days then the entire amount of per diem that would ordinarily be paid is "reclaimed" by SCPRC. App. at 22a. The record here establishes that SCPRC never held Railroad Respondents' cars more than five days but tended to hold them as close to five days as possible. App. at 22a.

There is significant interplay between the per diem reclaim period and the assessment of demurrage charges at the expiration of the 24-hour free time period. That interplay puts SCPRC in the position of being able to profit from delay and inefficiency.

The grain elevator at Charleston receives approximately

1,500 cars of grain per year. App. at 3a. During 1976, the last full year prior to the imposition of the Demurrage Rule, a total of 6,819 car days of demurrage were incurred at Charleston. App. at 3a. Simple arithmetic establishes that an average car load of grain was held on demurrage for 4.5 days. In a vacuum, that figure might not seem significant but on the facts of this case it is. Once the cars are actually *or* constructively placed the shipper or consignee has 24 hours of free time in which to handle the cars. The free time period and the five-day per diem reclaim period begin to run at the same time. Once the 24-hour free time is exhausted, four days still remain on the per diem reclaim period. But even more important is the fact that once the 24-hour free time period expires demurrage charges begin to accrue. Thus, there is a four-day window in which SCPRC can hold Railroad Respondents' cars without paying per diem while the cars are accruing demurrage. The significance of the 4.5 days of demurrage on each grain car that moved through Charleston in 1976, prior to the promulgation of the Demurrage Rule, is that it appears SCPRC took maximum advantage of the four-day reclaim window.

The interplay between free time, actual and constructive placement, and per diem reclaim places SCPRC in the position of the "fox guarding the hen house." Such a situation is inimical to the best interests of the rail transportation industry and helped lead to a situation where *SCPRC derived 61% of its revenues from fees which can only be collected where there is inefficiency and delay.*

That SCPRC had the opportunity to manipulate demurrage charges can be easily illustrated. If demurrage is assessed on the basis of constructive placement, SCPRC can constructively place rail cars and leave them constructively placed until demurrage begins to accrue. SCPRC's normal working hours are from 7:00 a.m. to 3:00 p.m. five days

per week. At any given time there are several jobs to be done using the switch engines. Let us assume a 20-car train is positioned by SCPRC for unloading at 7:00 a.m. on February 1, but only five cars are actually placed for unloading at the grain elevator. As of February 1 at 7:00 a.m. all 20 cars are deemed placed for purposes of assessing demurrage. Five are actually placed while the remaining 15 are constructively placed. The switch engine then goes to another part of the yard to do other work. The five cars actually placed are unloaded but the switch engine is not available to place additional cars for unloading and no more are placed that day. SCPRC would have no incentive to act promptly with respect to the remaining 15 cars because it knows that it will make money by leaving them on constructive placement.

On February 2, at the start of business, all 15 remaining cars are past free time and subject to demurrage charges. As long as SCPRC is allowed to retain the demurrage fees paid on those cars, it makes no difference to SCPRC how long it takes before the cars are actually placed for unloading so long as they are actually placed within the five-day reclaim period. In essence, once the cars are constructively placed it is to SCPRC's economic advantage to engage in other work at the yard while actually placing the remaining cars in small batches, infrequently. In that situation, SCPRC can collect switching fees for other work it is doing *while collecting demurrage fees for doing nothing.*

As mentioned earlier, because of the existence of the five-day per diem reclaim period the inequitable situation described above can be profitable to SCPRC for four days. For SCPRC, this is the best of all possible worlds: SCPRC does not pay Railroad Respondents for the use of their cars but gets paid where those cars are detained. Thus, SCPRC, which owns no rolling stock (App. at 7a) receives payments

for the detention of someone else's equipment. And, not only does SCPRC pay no per diem, it collects a switching charge of $35.00 per car on all traffic moving through North Charleston. Moreover, Railroad Respondents absorb $24.25 of this switching charge. The remaining amount is paid by the shipper. The full Commission and the Court of Appeals both apparently recognized the opportunity for abuse that existed under the old system and, therefore, endorsed Railroad Respondents' efforts to eliminate a serious threat to the efficient use of railroad rolling stock.

IV.

SUMMARY OF ARGUMENT

The Court of Appeals applied the correct standard of review in considering the Commission's decision. It searched the record to determine whether the Commission had acted in an arbitrary or capricious manner and made a specific finding that the Commission's decision rests upon substantial evidence. There is no basis in law or in fact for this Court to further review this matter.

The facts reveal that rail traffic at Charleston was being handled inefficiently and, in light of those facts, the Commission was duty-bound to take steps to eliminate the inefficiency. Upholding the Demurrage Rule gave effect to the nation's rail transportation policies as set forth in 49 U.S.C. §§ 10101a and 10750.

The purpose of demurrage is to compensate car owners for the lost use of their rolling stock and to encourage efficient car usage by penalizing delay. The first purpose cannot be given effect unless the Railroad Respondents receive payment for the lost use of their cars. The second purpose cannot be given effect where the SCPRC can make more money

by inefficiency and delay than it can by handling rail cars promptly.

The Petition contains material misrepresentations and distorted discussions of key facts. In several places, the inaccuracies are such as to violate Rule 21.5 of Rules of the Supreme Court which states as follows:

> The failure of a petitioner to present with *accuracy*, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying this petition.

The Petition is not meritorious and it should be denied.

V.

ARGUMENT

A. Judicial Review Of A Commission Decision Is Narrowly Circumscribed

Petitioners have been careful to avoid discussing the standard of review of a Commission decision. That review is narrowly circumscribed. In the decision here under review the Fourth Circuit applied an "arbitrary and capricious" standard to the Commission's ruling. App. at 34a. This standard gives effect to the rationale that rate making is a process that involves weighing myriad factors and one which should be left largely to the expertise and judgment of an agency equipped to handle complex issues of a specialized nature. In *Board of Trade* v. *United States,* 314 U.S. 354 (1942) this Court talked about the special role of the Commission in furthering the nation's transportation policy:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant

> of *factors that must be valued as well as weighed.* Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. . . .

314 U.S. at 546.

A corollary to the concept that rate making should be left to the experts is the line of cases in which this Court has stated that Commission decisions should not be set aside, modified, or otherwise altered by a reviewing court even though that court might have reached a different conclusion. Thus, where, as here, a Commission decision lies within the scope of the Commission's statutory authority and is based upon adequate findings supported by the evidence the decision should be allowed to stand. *See United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934); *Virginia Railway Co.* v. *United States*, 272 U.S. 658 (1926).

In *Mississippi Valley Barge Line Co.* the Court said that where a rational basis exists for agency action that action should not be disturbed. In the words of the Court:

> The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. . . . It is not the province of a court to absorb this function to itself. . . . *The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.*

292 U.S. at 286-287. The Fourth Circuit was careful to give due deference to the decision of the full Commission. Not only did the Court of Appeals uphold the Commission deci-

sion it did not have to strain to do so. It found substantial evidence in the record to support the conclusion that the Demurrage Rule is lawful. App. at 34a. Since the Court of Appeals acted properly in its review of the Commission decision there is no reason for a Writ of Certiorari to issue in this case.

B. The Decision That The Demurrage Rule Is Lawful Accords With National Transportation Policy

In section II of this Brief, Railroad Respondents call the Court's attention to 49 U.S.C. §§ 10101a and 10750. The first statutory provision sets forth the general policy that the Commission is required to take all steps necessary to promote the development of a sound transportation system. The second statutory provision applies more directly to the present dispute. It requires that demurrage charges be computed and applied in such a manner as to fulfill the national need for freight car use and distribution and the maintenance of an adequate supply of freight cars. Yet the facts of this case leave little doubt that prior to the imposition of the Demurrage Rule a condition existed at Charleston that ran counter to the national policy regarding the imposition of demurrage charges.

The Commission had a duty to do away with a situation where SCPRC could make more money by inefficiency and delay than by efficient, expeditious handling of rail cars. In deciding that the Demurrage Rule is lawful, the Commission was faithful to its statutory mandate. The facts showed that SCPRC was getting something for nothing when it was allowed to retain demurrage fees. Since SCPRC owns no cars it would not use the money collected from demurrage charges to make repairs on old cars or purchase additional cars. Moreover, the facts show that SCPRC was

"living off" demurrage fees: 61% of its 1976 operating revenues came from demurrage fees. Yet, *demurrage fees are only assessed when there are delays in handling rail traffic*. Something must be awry in order for a switching railroad to make less money from its switching operations than from collecting charges associated with inefficiency. The facts of this dispute make unmistakeably clear that whatever the specific mechanism, SCPRC succeeded in generating a large dollar volume of a type of fee that can only be generated where there is delay and inefficiency. Either SCPRC's port facilities were so congested that the congestion caused undue delay or SCPRC engaged in activities calculated to secure money for doing nothing. In either case, allowing SCPRC to retain the fruits of delay will do nothing to correct the problem. The national transportation policy required a change. The Demurrage Rule was the proper response and the Commission's decision to uphold that rule is absolutely right.

C. The Demurrage Rule Gives Effect To The Purposes For Which Demurrage Is Assessed

1. *The Elements Of Demurrage*

According to the Commission, a demurrage charge has two distinct elements. In *Ormet Corporation* v. *Illinois Central Railroad Company*, 341 I.C.C. 647, 650 (1972) the Commission said the following about demurrage charges:

> As noted by the division, *demurrage charges embrace two distinct elements*, namely, *compensation* for the use of the car *and* a *penalty* to ensure prompt return of the equipment to public service.

As we have stated previously, SCPRC owns no cars. Further, while Railroad Respondents' cars are on SCPRC's lines

Railroad Respondents do not receive any per diem payments. In addition, where cars *not owned* by Railroad Respondents are on SCPRC's lines, Railroad Respondents pay either per diem or car rental payments to the owners of those cars. This means that were SCPRC allowed to retain demurrage charges Railroad Respondents could lose the use of their cars for up to five days (the per diem reclaim ceiling) without receiving any compensation for them. It also means that Railroad Respondents could be required to pay per diem to other rail lines without receiving money to help defray those expenses.

The fact that SCPRC owns no rail cars means that it is not entitled to be compensated for the lost use of any rail cars. To allow SCPRC to retain demurrage would be illogical and unreasonable. SCPRC could not and would not use the money to enhance the availability of railroad rolling stock. Nor would it use the money to purchase new rail cars or repair old ones. Had the Commission allowed SCPRC to retain the demurrage fees it would have sanctioned a windfall for SCPRC and completely ignored Railroad Respondents' need for the compensation component of demurrage.

With respect to the penalty component of demurrage, we have already discussed the opportunity presented to SCPRC to make money from delay and inefficiency. The penalty component of demurrage cannot operate effectively where the recipient of the charges is implicated in generating them. Had the Commission declared the Demurrage Rule unlawful the result would have been to give SCPRC an economic incentive to increase the amount of demurrage charges, which means, in plain English, an incentive to encourage or participate in delay. Such a situation would have been unfortunate and flatly at odds with the concept

of "promoting car efficiency." The Commission eliminated that possibility by declaring the Demurrage Rule lawful. In its wisdom, after careful, thorough consideration, the Fourth Circuit found the Commission's decision to be well-formed and properly grounded.

2. *Demurrage Cannot Be Used To Generate Revenues*

One very significant fact in this case is that in 1976, the last full year prior to the imposition of the Demurrage Rule, SCPRC derived 61% of its operating revenues from demurrage charges. SCPRC operates a switching line. A switching line is supposed to make money from switching rail cars. It is extraordinary that more than half of SCPRC's operating revenues would come from a source that is unrelated to the purpose for which it is in business.

It is well established that demurrage fees cannot be relied upon as a source of revenue. In *Increased Demurrage Charges, 1956,* 300 I.C.C. 577, 585 (1957) the Commission said this about the relationship between demurrage and operating revenue:

> It has long been recognized that *demurrage charges are not to be regarded as a source of carrier revenue,* and no increase in such charges has been authorized in the general revenue proceedings of recent years.

See Switching Charges of Buffalo Creek Railroad Co. at Buffalo, N.Y., 266 I.C.C. 135 (1946). In *Commerce And Industry Assoc. of New York, Inc.* v. *Baltimore & Ohio Railroad Co.,* 281 I.C.C. 655, 659 (1951), the Commission gave this expanded statement of the proper role of demurrage charges:

> Unlike most charges for transportation services, demurrage charges are, with some exceptions, uniform throughout the country, and have equal application in

> large metropolitan areas where property values are very high and in small hamlets and towns where carrier investment and terminal property are of relatively low value. *Those charges are not primarily a source of added revenue to the carriers.* They are designed to *compensate the carriers* for the shippers' use of cars for storage and, of equal importance as applied in rail transportation, are *an incentive to compel release of carrier equipment.* The necessity for demurrage is well recognized. Such charges serve the best interests of the railroads, the users of rail transportation, and the public in the maintenance of an adequate transportation service. *Demurrage becomes increasingly important during periods of car shortages in order to maintain the available car supply to the best interests of all concerned.*

On the facts of this case, it is plain that the Commission sought to correct the obvious problem of allowing a switching railroad to secure 61% of its operating revenues from demurrage fees. SCPRC's heavy reliance upon demurrage fees violates well-established precedent and cannot be justified. The rule against use of demurrage fees to generate revenues will not tolerate a situation such as that which developed at Charleston prior to the imposition of the Demurrage Rule.

D. The Arguments Advanced By Petitioners Do Not Warrant The Issuance Of A Writ Of Certiorari

1. *The Commission's Decision Does Not Embody A Radical Departure From Long-Standing Precedent*

There has been no change in Commission policy with regard to promoting maximum efficient utilization of railroad rolling stock. All the Commission did was to rule that the Demurrage Rule helps effectuate existing policy. In short, the policy is the same but the means of putting it into effect

have been augmented. Moreover, the decision that switching lines such as SCPRC should not be allowed to retain demurrage is the outgowth of a problem that was recognized as early as 1975. At that time, then Chairman O'Neal recognized the dangers of allowing short line switching railroads such as SCPRC to retain demurrage fees paid on inbound line-haul traffic. In a speech to the American Short Line Railroad Association Chairman O'Neal said this on the subject:

> Prior to 1975, the terminating Railroads—in many cases, short-lines—kept all the revenue from the demurrage charges. No payment of any kind was returned to the owning lines.
>
> That looked pretty good from your angle. But *questions arose about what effect this had upon car supply,* and *whether this procedure really served the public interest.*
>
> In 1975, we made an interim decision to allow demurrage charges, in excess of $10 per day, to return directly to the owning railroad. *The commission saw this action as an incentive to improve car utilization, and to encourage investment in rail cars.* But we weren't sure, at that time, of its feasibility.
>
> . . .
>
> Will the decision have the effect we sought? *We think it will help utilization and will increase the return on investment in rail cars.* And economics tells us that by increasing the return, we will likely stimulate investment.
>
> *I know our decision doesn't make this organization very happy,* because it cuts into a source of revenue for many of you. *But in balancing your interests with others, and with the health of the rail industry as a whole, we felt the action was necessary and useful in*

> ***creating an incentive to maintain and to increase our railcar supply.***

O'Neal, A. Daniel *Short Line Railroads: Small Enough to Manage Large Enough for Profit.* Remarks before the American Short Line Railroad Association October 16, 1978 at pages 8 and 9.

The facts in this case show that the worst fears of the Commission were realized during the time SPCRC was allowed to retain the demurrage fees. More than 6,800 car days of demurrage were created on only 1,500 cars, generating 61% of the money used by SCPRC. Just as Mr. O'Neal suggested, that procedure had a negative effect on car supply and did not serve the public interest. It is not in the best interest of the nation to permit switching railroads such as SCPRC o derive substantial revenues from collecting and retaining demurrage receipts. As noted, switching railroads, such as *SCPRC can largely control the amount of demurrage assessed on cars by expediting or delaying handling once the cars are constructively placed.* Surely, therefore, it makes no sense whatever to permit SCPRC to collect receipts where its interest is served by running up charges. To do so is to foster delay instead of the statutorily mandated and desirable speed and efficiency. It is manifest that if SPCRC were required to derive its revenues from switching, it would switch rail cars at an accelerated rate, so as to maximize its revenues. There is nothing radical about eliminating the incentive for delay from the rail transportation system.

2. *Demurrage Fees Have Nothing To Do With The Provision Of Any Services*

Demurrage fees are not paid to someone on receipt of a service. They are paid when cars are held beyond free

time. There is no service a carrier can provide in order to earn demurrage. SCPRC makes repeated statements concerning what it describes as the general rule that one carrier cannot collect for services provided by another. That general rule, to the extent it exists, has no bearing on this case.

Kansas City Power & Light Co. v. *Kansas City Southern*, 361 I.C.C. 848 (1979), which is heavily relied upon by Petitioners to support the rule, is distinguishable on its facts. There, the issue was whether a line-haul carrier could charge its customers for limited absorption in an amount in excess of the switching charges actually absorbed by the line-haul carrier. Some background may help explain that case. Switching lines such as SCPRC charge switching rates for the service of moving rail cars from the point of interchange with the line-haul carriers to final destination at dockside or a grain elevator located on the switching railroads' lines. In many instances the inbound line-haul carrier charges the shipper a through rate that has in it a component that will be used to pay or "absorb" all or part of the switching charges. In *Kansas City Power & Light Co.* the line-haul carrier increased the switching component of its through rates without passing the increased payments on to the short line which actually did the switching work. The result was that the line-haul carrier was collecting and retaining switching fees although it did not provide any switching services. The Commission ruled that either the increased switching component of the through rate had to be eliminated or else it had to be paid to the switching line. In no event was the line-haul carrier entitled to keep that money.

By contrast, as noted, demurrage does not come about as the result of a service being provided. Thus, the rule of *Kansas City Power & Light Co.* has no application here.

3. *The Petition Contains Inaccuracies That Require Dismissal*

Rule 21.5 of Rules of the Supreme Court of the United States states as follows:

> The failure of a petitioner to present with *accuracy*, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying this petition.

There are several inaccuracies in the Petition.

On page 10 of the Petition, Petitioners set forth a list of things which they claim the Commission ignored in upholding the Demurrage Rule. The first item, that SCPRC is an independent common carrier, is of no moment in this case. Even if SCPRC does have its own corporate charter it does not contract directly with the shippers who move grain to Charleston using Railroad Respondents' facilities. With respect to grain moving under ICC SFA 4020-A, SCPRC contracts with Railroad Respondents to do switching work. Thus, as far as this case is concerned SCPRC works for and on behalf of the inbound line-haul carriers.

The next allegation on page 10 regarding things the Commission alledgedly ignored is so "nicely" worded that it is misleading. The words are as follows: "It ignores the fact that PTSC is a party in its own right *to tariffs* applicable to the involved traffic." All but the most careful reader would take this representation to mean that SCPRC is a party to the tariff which embodies the Demurrage Rule. That conclusion is flat wrong. It may be true that SCPRC is a party to a tariff which shows that SCPRC has facilities at Charleston. However, SCPRC is definitely not a party to ICC SFA 4020-A which is the tariff that embodied 380(F) and on which the grain coming into Charleston moved.

Further, SCPRC leaves the impression that where switching charges are only partially absorbed by the line-haul carriers it, SCPRC, must collect the unabsorbed switch charges from the shipper/consignees. This representation is, at best, only partly true. Seaboard pays SCPRC the entire switching charge and collects any unabsorbed amount from the shipper/consignee. Thus, at least with respect to its dealings with Seaboard, SCPRC has no occasion on which to make direct contact with shipper/consignees.

Petitioners attempt to undercut the Commission's finding of the existency of an agency relationship by attacking only one of the several cases relied upon by the Commission in reaching that conclusion. Yet, the attempt is futile. Contrary to Petitioners' allegation, *Missouri Pacific Railroad Company* v. *Reynolds Davis Grocery Co.*, 268 U.S. 366 (1925) is not the principal case relied upon by the Commission in support of its agency finding. It was merely one of several that were string cited by the Commission. See App. at 22a. The principal case relied upon by the Commission is *A. F. Pringle & Co., Inc.* v. *Atlantic Coast Line R. Co.*, 278 I.C.C. 655 (1950). Petitioners do not discuss this case at all. They attack the wrong "principal" case. In so doing they expose the weakness of their own position. Moreover, Railroad Respondents submit that the distinction Petitioners attempt to draw between a delivering carry in "terms of liability" and the delivering carrier in "terms of physical operations," is not supported by *Missouri Pacific Railroad Co.* On the contrary, it is quite plain from a reading of that case that it announces a general proposition that where the final carrier named on a bill of lading employs another carrier who is not named in the bill of lading to do switch work, the first carrier is the delivering carrier and the second is its agent. That is the situation here in existence.

Railroad Respondents suggest that the inaccuracies pointed out above violate Rule 21.5. They serve, therefore, as independent bases for dismissing the Petition.

VI.

CONCLUSION

The Demurrage Rule fosters the national transportation policy, encourages efficiency in rail car utilization, and discourages delay and inefficiency in handling rail cars. In ruling that the Demurrage Rule is lawful, the Commission weighed conflicting arguments, reviewed a full record, and arrived at the answer best calculated to promote the nation's transportation policy. It rejected the contention that an entity which owns no rail cars should be compensated when rail cars belonging to others are detained. It refused to accept an argument that an entity should be in a position to gain revenues from payments that are made only where there is delay and inefficiency. In all particulars, the Commission rendered a fair, well-reasoned, and factually supported decision.

In the same vein, the Court of Appeals for the Fourth Circuit applied the correct standard of review and concluded that the Commission's decision is appropriate on the facts. The Court of Appeals analyzed the Commission's decision-making process and found it sufficient. The Commission's decision was right in the first instance and the Fourth Circuit's decision is equally correct. This is not a case in which a Writ of Certiorari should issue.

WHEREFORE, for all the foregoing reasons, Railroad Respondents pray that the Petition for Writ of Certiorari

be denied, and that they be awarded their costs and fees herein expended.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief In Opposition On Behalf Of Seaboard Coast Line Railroad And Southern Railway System were mailed to counsel of record for each party to this proceeding on October 26, 1982.

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No. 82-516

IN THE

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v.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This reply is submitted by petitioners, State of South Carolina, South Carolina Public Railways Commission, and The American Short Line Railroad Association in response to the brief in opposition filed jointly by Seaboard Coast Line Railroad ("SCL") and Southern Railway System ("SRC") (sometimes referred to collectively as "rail respondents").

Petitioners are constrained to respond to two aspects of the brief in opposition of rail respondents. First and foremost, petitioners categorically reject the allegation that they have been less than candid with the Court. Such a suggestion is totally unfounded and is particularly offensive in view of the serious

distortions, inaccuracies and unfounded assumptions contained in the rail respondents' brief in opposition. Petitioners have no desire to engage in an unprofessional exchange of accusations which can serve only to divert the Court's attention from the important substantive question presented by this case. At the same time, however, petitioners feel obliged to respond to rail respondents' charges lest silence be construed as acquiescence.

At page 19 of their brief in opposition rail respondents accuse petitioners of "several inaccuracies" and suggest those asserted inaccuracies as a basis for denial of the petition pursuant to Rule 21.5 of the Rules of this Court. It might be expected that such a serious allegation would be supported by reference to genuine inaccuracies. However, examination of the "inaccuracies" alleged by rail respondents reveals that it is their representations rather than those of petitioners that are inaccurate.

The first such charge is that petitioners were in error in asserting that the Port Terminal Railroad of South Carolina ("PTSC") is a common carrier in its own right holding itself out to the public to provide service on its lines. Rail respondents contend that this is wrong because PTSC "does not contract directly with the shippers who move grain to Charleston using Railroad Respondents' facilities". The transportation services involved in this dispute are performed pursuant to applicable tariff rates rather than the terms of a negotiated contract. PTSC is a party to the tariffs which govern the services that it performs. This is precisely what petitioners said in language which rail respondents attack as "misleading". The precise language in question is as follows:

> It [the ICC decision] ignores the fact that PTSC is a party in its own right to tariffs applicable to the involved traffic.

Rail respondents reject this representation as "flat wrong". Yet it is completely accurate.

Rather than publishing a separate, independent tariff, PTSC

participates jointly in a single publication containing the rules and regulations of many carriers. Such a publication, to which PTSC was a party at all times relevant to this proceeding, is ICC SCL 8031-B which contains, *inter alia,* the rules and charges governing switching, aborption, demurrage and other terminal charges or allowances applicable to transportation operations performed on the lines of PTSC. That publication, instead of internally specifying the actual demurrage charges assessed by PTSC and other participating carriers, contains a provision which incorporates by reference the provisions of other tariffs which contain the actual demurrage charges. Specifically, Item 130 of ICC SCL 8031-B provides that, subject to an exception, PTSC will apply the demurrage charges published in ICC SFA 9326 to export or intercoastal traffic and the demurrage charges published in ICC PHJ 6004-L to all other traffic. The exception, which is stated in Item 130, applies where traffic is delivered to PTSC pursuant to a line-haul tariff such as ICC SFA 4020-A which contains special detention charges and rules. In those instances PTSC will apply the special rules in the line-haul tariff rather than the standard rules contained in ICC SFA 9326 or ICC PHJ 6004-L. By virtue of Item 130, the demurrage charges published in ICC SFA 4020-A are incorporated by reference in PTSC's tariff just as if they were physically reproduced therein. Thus, contrary to the assertions of rail respondents, the assailed statement is not "flat wrong". It is absolutely accurate and in no way misleading.

The only other "inaccuracy" cited by rail respondents to support their charges is the allegation that petitioners were in error in identifying *Missouri Pacific Railroad Company* v. *Reynolds Davis Grocery Co.,* 268 U.S. 366 (1925) as the principal case relied on by the ICC in its *sua sponte* revelation that PTSC is an agent of the inbound line-haul carriers that move grain to Charleston. Rail respondents suggest that the principal case on which the ICC actually relied is *A.F. Pringle & Co., Inc.* v. *Atlantic Coast Line R. Co.,* 278 ICC 655 (1950). Even if rail respondents were correct in their contention, to accuse the opposing side of inaccuracy and lack of candor on the basis of a

dispute as to which case is the principal authority for a position taken by the tribunal whose action is under review is conduct inappropriate to litigants before this Court. Such conduct is particularly egregious in that any fair reading of the ICC decision clearly reveals that the *Pringle* case was cited in passing only for the general proposition that "it is common practice for terminal carriers to act as agents for line-haul carriers" (App. 21a). This is a proposition which is not here in dispute. Rather, it is with respect to the further finding that "the facts of this case lead us to conclude that the switching roads are agents of the line-haul carriers" that the ICC was in error. It is in support of that erroneous finding that the ICC cites the *Missouri Pacific* case as its principal authority (App. 21a-22a). That is precisely what petitioners represented to this Court. Thus, the charge made by rail respondents is totally baseless.

If rail respondents' allegations are instructive for any purpose, it is to demonstrate their propensity for obfuscation of a complex issue, which, petitioners submit, confused the Court below and caused it to grant undue deference to the ICC's agency expertise. This propensity is also evidenced by the rail respondents' brief in opposition. Petitioners have no desire to burden the Court with a detailed refutation of those defects. However, petitioners believe that identification of some of the more salient misstatements is appropriate in order to demonstrate the handicap of deliberate confusion imposed upon the Court below.

At the outset of their brief in opposition, rail respondents attempt to suggest that the position of petitioners with respect to the pivotal issue in this proceeding has been consistently and unanimously rejected at every level of consideration. They ignore the facts that the position of petitioners was determined to be completely meritorious by the Administrative Law Judge who conducted the evidentiary proceedings and by the ICC Review Board of senior career employees who affirmed that decision on appeal. It was only after an appeal had been taken by the rail respondents to the U.S. Court of Appeals for the

Fourth Circuit and the case was in the midst of being briefed, that the matter was recalled by the ICC and a determination unfavorable to petitioners was issued by the ICC. Thus, contrary to the impression that respondents seek to convey to this Court, decisions rendered by those who have considered this controversy do not reflect either consistency or unanimity. Quite the contrary, the diametrically opposed positions of the ICC on the one hand and, on the other, the Administrative Law Judge and ICC staff members (who actually possess such expertise as may exist within the agency) demonstrate that the issue presented in the instant petition is both controversial and substantial.

In a similar vein, respondents suggest that "petitioners do not contend that the case involves an important federal question that should be settled by this Court". Such an allegation is so clearly at odds with the facts that it raises serious questions as to whether it could have been made with candor. At the very outset of their petition to this Court, petitioners have identified the importance and the far-reaching consequences of the ICC decision as to which review is requested. Indeed, as was also explained in the petition, the ICC itself recognized the issue to be resolved as one of "general transportation importance" (App. 16a) and as one of novel impression (App. 20a).[1]

The inappropriately adversarial "Statement Of The Case" presented by rail respondents is also larded with fundamental misstatements. At the very outset of the statement they contend that "Petitioners seek to secure something for doing virtually nothing". What petitioners seek is compensation for PTSC for terminal services which it provides at considerable cost. PTSC presented unrebutted testimony that it spends thousands of dollars annually to maintain holding tracks in accordance with Federal Railroad Administration safety standards. It also

[1]The significance of the designation of the case as one of "general transportation importance" is clearly evident from the fact that of the 30,696 formal proceedings before the ICC in 1981, only a handful were determined by the ICC to present questions of "general transportation importance".

presented unrebutted testimony as to costs incurred in surveillance, recordkeeping and other functions essential to effective administration of demurrage rules. These are tangible expenses which have traditionally been paid for with the portion of demurrage charges retained by the carrier on whose lines the cars are held. By contrast, SCL and SRC incur no costs in connection with cars held on the lines of PTSC. Therefore, it is rail respondents and not PTSC who are seeking something for nothing.

Rail respondents then go on to suggest that PTSC is somehow in a position to increase the amount of demurrage charges which accrue on its lines by operating inefficiently. This allegation has absolutely no support in the record or in the decisions below. Quite the contrary, the testimony submitted to the ICC establishes that PTSC is an extremely efficient carrier and rail respondents know this to be the case. Furthermore, the "assumption" that PTSC switches cars only at infrequent intervals is known by rail respondents to be at odds with PTSC's actual pattern of operations which characteristically involves three or four switches each day. Rail respondents' "assumption" also ignores the critical fact that a shipper is required to pay demurrage charges only during periods when cars are being held at the shipper's request. Until the cars are tendered to the shipper, they accrue no demurrage; as soon as the shipper releases the cars, demurrage ceases to accrue regardless of when the line-haul carrier actually removes them. Therefore, the efficiency with which PTSC handles cars has no bearing on the amount of demurrage that accrues on its lines.

In their statement of the case, rail respondents also incorrectly suggest that "the full Commission and the Court of Appeals both *apparently* recognized the opportunity for abuse that existed under the old system" [Emphasis added]. That statement is absolutely incorrect. Neither the decision of the ICC nor the decision of the U.S. Court of Appeals contain any expression of concern as to either actual or potential abuse of demurrage provisions by PTSC. That contention is wholly one of rail

respondents' creation and it is obviously stated to this Court for the purpose of prejudicing the position of petitioners by suggesting, without the slightest support in the record or the decisions below, that PTSC has ever acted improperly in connection with the administration and enforcement of applicable demurrage rules.

Furthermore, the suggestion by the rail respondents that there is an "old system" and a "new system" is misleading. The physical operations performed by PTSC in connection with cars held on demurrage on its lines are exactly the same today as they were before Item 380(F) became effective. The only change is that PTSC is no longer being compensated for the cost of those operations. Instead, the line-haul carriers are collecting and retaining the demurrage charges even though they perform absolutely no physicial function in connection with handling of cars held on the lines of PTSC any more than they did before Item 380(F) became effective. Thus, contrary to the implication of the argument of rail respondents, there has been no enhancement in car utilization since rail respondents are simply not in a position to make any such change.

In their argument, rail respondents suggest that great deference is due to the ICC in a matter of this type since it involves "the process of rate making". That statement is not accurate. There is no issue of "rate making" involved in this case. The levels of demurrage charges applicable to rail cars held on the lines of PTSC is not an issue in this proceeding and has never been an issue. Nor is the level of any other rate. Rather, the issue, as stated by petitioners, is a simple and direct one. It involves an action of the ICC purporting to authorize one carrier to collect and retain the charges attributable to a terminal service provided by another carrier. In this regard, it is also appropriate to comment upon the contention vigorously asserted by rail respondents that "demurrage fees are not paid to someone on receipt of a service". That contention is refuted by the ICC's own rules which expressly recognize demurrage as a terminal service. Specifically, 49 C.F.R. § 1300.10(a) provides in pertinent part as follows:

> Each carrier or its agent shall publish, post and file tariffs which shall contain in clear, plain, and specific form and terms all the rules governing and rates and charges for *demurrage,* switching, floating, lighterage, wharfage, *and other terminal services.* [Emphasis added].

Thus, demurrage is indeed a terminal service. More specifically, it is a terminal service which is performed by the carrier on whose line the car holding occurs. *Demurrage Rules and Charges, Nationwide,* 340 ICC 83 (1971).

At pages 15 through 17 of their brief in opposition rail respondents present an argument grounded upon a speech delivered by former ICC Chairman A. Daniel O'Neal in 1978. In that speech reference is made to a 1975 decision which rail respondents represent as having some precedential value in this case. That decision of the ICC, *Remittance of Demurrage Charges,* 349 ICC 411 (1975), actually confirmed the right of the carrier on whose lines demurrage accrues to collect demurrage charges. What the case held is that the delivering carrier should remit to the car owner all demurrage charges in excess of $10 per car which was recognized as essential to compensate the delivering carrier for the costs associated with holding cars on demurrage. This represented a departure from the former rule which provided for the delivering carrier to remit per diem to the car owner and retain the balance of the demurrage charge. This would result in retention of a smaller portion of the demurrage charge by the terminal carrier and it is that result which Chairman O'Neal recognized a one which would not make the carrier representatives in his audience "very happy".[2]

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[2]It is noteworthy that Chairman O'Neal rendered the dissenting opinion in both decisions issued by the Commission in Docket No. 36927, *South Carolina Public Railways Commission Petition For Declaratory Order,* the case in which the ICC refused to institute a proceeding to resolve the lawfulness of Item 380(F) and directed SCPRC to file a formal complaint. Chairman O'Neal observed in his dissents that the position of SCPRC appeared to be meritorious and should be considered by the ICC.

If the case is of any significance here it is because it confirms the validity of petitioners' position that the ICC, prior to the case which is here under review, consistently recognized the right of the delivering carrier to retain a portion of demurrage charges to cover the cost of holding cars on its lines. Specifically, the ICC stated that: "The amount retained by the serving [i.e., terminal] carriers, in fairness, should be sufficient to cover all expenses incident to demurrage and to the administration of this proposal." 349 ICC at 442.

It is also noteworthy that the decision referred to by Chairman O'Neal never actually went into effect. See, *Remittance of Demurrage Charges*, 364 ICC 623 (1981). Thus, what rail respondents have tendered to this Court as authority for their arguments is a speech making reference to a decision of the ICC which never became effective. Such representations have no proper place in briefs filed with this Court.

Petitioners could cite further inaccuracies in the rail respondents' brief in opposition; but, as previously stated, petitioners have no desire to engage in an exchange which can only serve to divert the Court's attention from the very critical issue affecting terminal carriers nationwide. Petitioners would respectfully suggest to the Court that the character of rail respondents' brief provides compelling insight into the intensity and far-reaching impact of this proceeding.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION OF FEDERAL RESPONDENTS

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Petitioners believe that the brief in opposition of the federal respondents presents a generally fair, accurate and balanced statement. It is with respect to only one point that petitioners feel obliged to respond. That point is one which brings into focus the conflict which is at the basis of this litigation.

At page six of their brief in opposition federal respondents state as follows:

> ". . . petitioners argue that the terminal carrier's expenses entitle it to keep the elevator's demurrage payments. The Commission addressed and

> rejected this argument because it found that the terminal carrier, unlike the line-haul carriers, can at least theoretically recover its expenses by raising its switching charges."

This statement epitomizes the basic defect in the reasoning of the ICC which caused it to reverse the decisions of its Administrative Law Judge and its Review Board which applied the well-established policy that the carrier on whose lines cars are detained is entitled to demurrage charges accruing as the result of such detention. Essentially the ICC decided that, in balancing the need of the Port Terminal Railroad of South Carolina ("PTSC") to recover the costs concededly incurred in holding cars on its line and the needs of the line-haul carriers to recover the costs of ownership of the cars, PTSC is in a better position than the line-haul carriers to make up for any revenue shortfall by other means. This conclusion ignores the fact that any revenue shortfall of the line-haul carriers (even assuming that it may exist) is a situation of their making and a situation to which, contrary to the basic premise of the ICC decision, the line-haul carriers are in a better position to respond than is PTSC.

It is well-recognized that car ownership costs are a basic ingredient of line-haul rates.[1] This includes the cost of owning cars while they are moving under load, their empty return movement and anticipated idle time at origin and

---

[1]See, for example, *Virginia Blue Ridge Railway* v. *Southern Railway Company*, 96 ICC 591, 594 (1925) in which the ICC observed that: "Car-ownership cost is one of the transportation costs which should be considered in connection with the portion of the transportation performed by the independent line-haul carrier when fixing its division of the through rate." More recently, in *Remittance of Demurrage Charges*, 353 ICC 567, 591 (1977) the ICC expressly recognized that: "Per diem expenses are also used in computing the line-haul rate."

destination while awaiting loading and unloading. The latter factor is included on the assumption that a car normally will be at destination for up to five days since that is the period for which the line-haul carriers, on their own initiative, have determined to provide for reclaim by the terminal carrier of charges intended to compensate for car ownership costs (i.e., per diem).[2] The line-haul freight rates were established with full knowledge of the preexisting per diem reclaim commitments. Thus, the line-haul carriers are already receiving, as an element of their line-haul rates, compensation for ownership of their cars while they are in revenue service including a five day unloading period at destination during which per diem is subject to reclaim.

If the line-haul carriers have miscalculated their revenue requirements in establishing their line-haul rates, it is within their exclusive province to make appropriate adjustments to their line-haul rates. Furthermore, it is appropriate that they should be the ones to make the adjustments since it is they who made the miscalculation. What is not proper and not appropriate is what they have done here – namely take from PTSC demurrage charges which PTSC must have in order to cover the cost of holding cars.

The ICC decision is based on the erroneous assumption stated in the brief in opposition of federal respondents that PTSC can make up for this expropriation in that it ". . . can *at least theoretically* recover its expenses by raising its switching charges." [emphasis added]. This assumption is simply not correct – not even "theoretically". Ex-

[2]Beyond that five day period, PTSC can and does compensate the line-haul carriers for their car ownership costs by payment of per diem charges which are not subject to reclaim.

cessive switching charges intended to compensate PTSC for services normally paid for by demurrage charges would place Charleston at a competitive disadvantage with other ports and thus does not represent a realistic course of action. Moreover, it is a solution which would be fundamentally inequitable in that it would improperly penalize innocent parties in order to compensate for miscalculations by the line-haul carriers of their line-haul rates. It would impose upon shippers who handle cars promptly the burden of costs generated by shippers who do not unload and release cars promptly. As petitioners observed in their petition for writ of certiorari, such an arrangement would be the very antithesis of the concept of just, reasonable and non-discriminatory treatment of shippers which is the very foundation of the Interstate Commerce Act.

If the line-haul carriers have made a mistake in calculating their line-haul rates at a level sufficient to properly reflect pre-existing per diem reclaim agreements, they should correct that error rather than force PTSC to commit another wrong by improperly penalizing shippers for costs for which they have no responsibility. Succinctly stated, two wrongs don't make a right. Yet, the ICC decision and its argument to this Court are grounded squarely on the contention that they do. Therefore, it is not a reasonable or rational determination.

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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